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Nos. 23, 24 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; BLAINE S. SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A TO BRIEF OF RESPONDENTS

A TOPICAL DIGEST OF THE EVIDENCE

VOLUME III

Part VI—Truck Delivery
Part VII—Water Delivery
Part VIII—Diversion of Cement in Transit
Part IX—Early Trade Association
Part X—The Cement Institute: General
Part XI—The Cement Institute's Services
Part XII—The NRA Cement Code
Part XIII—Aetna's Practices and the Cree Incident

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INDEX TO VOLUME III

Corrections to Volume III

Volume III—
Cover —Part IX should read "Early Trade Associations".

Index, page ii,
line 13 —"Code" should read "Cole".

Index, page iv —Title for Part IX should read "Early Trade Associations".

Index, page vii,
line 7 —Should read "a. Early Work: 1903-1915".

Page 1525,
lines 18, 21, 24 —On each line "*infra*" should read "*supra*".

Page 1664, line 18—Correct spelling of "demoralized".

" 1795, line 18—Insert "p. 1001" after Part V B.

" 1850, fn. 1—Change "p. 691" to read "p. 692".

" 1978, line 27—Should read "a. Early Work: 1903-1915".

" 2056, fn. 1—Change "Part IV E 5 b i" to read "Part IV F, p. 975".

" 2116, fn. 22—Should now read "Part XIV, p. 2298 *et seq.*"

" 2116, fn. 24—After "*infra*", add "Part XIV, p. 2298 *et seq.*"

" 2158 —Add indicator for fn. 22 after the quotation at end of page.

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PART VI

TRUCK DELIVERY

A. The Trucking Problem: General.

The following letters are reproduced in full text (in so far as they deal with trucking) because they are the most comprehensive and thoughtful general discussions of this subject that appear in the record. In the same category belongs the long answer by Lehigh to the Burns-Clark Questionnaire in 1935.

Letter dated November 29, 1929, D. S. MacBride, Vice President, Lone Star, to Garner Beckett, President, Riverside:

> "I could write you a thesis on trucking. Properly handled, in territories of small consumption, trucking is a very satisfactory means of transportation. Under all other conditions it exerts a most demoralizing influence over the market affected. There are several large trucking markets in the territory. Universal puts about 6,000,000 barrels into the City of Chicago annually on trucks. The Medusa Company supplies the major requirements of the city of Toledo under a very vicious trucking arrangement from their Silica mill. The Detroit market is demoralized by trucking from Peerless and Wyandotte. Cleveland has suffered for years as a result of indiscriminate trucking from the bulk warehouses and packing station there maintained by the Huron Company. Pittsburgh has been upset by the Universal Company trucking from their plant at Universal, Pa., and now from the Basic Products Company's plant on Nevil Island. I understand that the Bessemer Company is adding to the confusion in that market by putting up a new plant which will be located on the court house steps. Syracuse has for years been dominated by trucking from the Jamesville plant of Alpha.
>
> We have been trucking for years from our Houston and Dallas plants in Texas without difficulty.

These markets are also served by the Trinity Company. The only trucks served are those operated by a trucking concern which has a published line of rates to the various parts of the cities, which have been zoned and priced for the information of all consumers and producers alike. This trucking company is bonded both for performance and against manipulation. It acts in exactly the same capacity as a Railroad Company or an electric line. The delivered prices in various parts of the cities are based on the mill price to the manufacturer, plus the published cost of transportation from the producer's plant to the zone of the city in question.

Eastern Pennsylvania and Northern New Jersey have for the past few years been a veritable madhouse. Indiscriminate trucking has brought forth greater and greater concessions by producers, until it finally reached the point at which manufacturers were absorbing thirty and forty cents a barrel in order to lay cement down by truck on the job. Whenever a manufacturer makes a delivered price by truck, or employs a trucker, only trouble and suspicion can result. An attempt has been made to correct this condition by placing a truck price on the various mills. This price is generally 15¢ a barrel higher than the carload price. Most manufacturers have now refrained from employing trucks but allow the contractor or the dealer to engage transportation from the mill to the job. The charge is the mill truck price on board the customer's trucks. The tendency of this method is to limit trucking to within 12 or 15 miles of the mill. In the case of Philadelphia, with a mill at West Conshohocken, about twelve or fourteen miles from City Hall, a 5,000,000 barrel market is pretty well shot to pieces by this practice.

The question has not yet been solved. I believe that we will not reach a solution until trucking is entirely eliminated or else a plan similar to the one which we have followed for years in Texas is adopted. You ask about the dealer's attitude on this subject. The intelligent dealer resents trucking unless he is doing it with his own equipment. Most dealers, however, are interested in price, and if

they can make a lower price by truck than by rail—they are for it. Economically, trucking is suicide for the dealer. If a manufacturer can lay the material on the job without the dealer performing a service other than the handling of the customer's credit, resale margins are bound to approach the vanishing point, and with the margin goes the dealer." (Com. Ex. 1203 TT-UU)

[Letter dated June 25, 1935. Dr. A. R. Burns to Blaine S. Smith, President, Penn-Dixie:

"A number of questions have already occurred upon which your advice would be helpful. I enumerate these below:

* * *

3. It is stated in a number of the questionnaires, among the reasons for charging a price for delivery to buyers' trucks at the mill above the base price, that such deliveries involve additional costs. I believe that Mr. Browder has already explained that few mills are equipped to deliver to buyers' trucks simultaneously with the loading of railroad cars and that delivering to trucks, therefore impedes the loading of cars. It has also been suggested that the premium upon such deliveries is justified because deliveries to buyers' trucks are frequently also deliveries to retail purchasers and involve credit risks which do not accompany deliveries by railroad to dealers or contractors. We should be very glad if you could give us any information which would indicate whether or not the premium has been calculated to cover the additional costs of loading and the additional credit risk. If there have been any calculations of these additional costs, we should be glad to know how the calculations were made. I believe that at one of the meetings of the Marketing Research Committee it was said that the premiums were aimed rather at the elimination of deliveries to buyers' trucks because of their tendency to undermine the basing point system in general, more particularly by impeding the operation of the system of distribution by dealers. Would these com-

plaints by dealers be eliminated if all dealers resorted to taking delivery by truck? The questionnaire called for no information concerning deliveries to buyers' trucks. Has the industry in general information concerning the amount of these deliveries over the past few years?" (Com. Ex. 958-3D-E)]

[Letter dated July 3, 1935, Blaine S. Smith, President, Penn-Dixie to Dr. A. R. Burns in reply:

"Trucking of cement is a complicated matter. The conditions necessitating or warranting prices for deliveries to buyers' trucks at the mill above the base price are numerous and vary as among the different mills, and those you mention are among them. However, it is a doubtful statement that deliveries to buyers' trucks at the mill or deliveries at destination by trucks controlled by the seller have a tendency to undermine the basing point system in general. Use of the truck in the cement business has an effect, not on the so-called basing point system, but on the cost to different customers at destination. The manufacturer, when delivery is by truck cannot protect the markets of its many customers. The buyer located in one market area will make deliveries in another market area that he does not usually serve and cause a disruption of marketing conditions as between the manufacturer's customers. The difference in the cost of delivery by truck was partly due either to the method of figuring used by the buyer on his own trucks or to the rates quoted by different independent truck operators on the same movement or even to different rates by the same independent truck operator to two or more buyers on the same movement. Also in many cases there was a difference in the cost of delivery by trucks vs. railroad cars due to the difference in the unloading expense at the warehouse or point of use. Also a smaller investment in cement is required in the handling of the smaller quantity by truck than in the larger quantity by railroad car. Because of your familiarity with the cement business you realize that cement, being a standard-

ized product, must be sold to all customers of the same class at the same place at the same time at the same or substantially the same price. When on account of trucking different prices prevailed under these conditions, it reacted on the manufacturer. Customers were dissatisfied and critical.

In view of the above mentioned facts, the condition would not be relieved if all dealers resorted to taking deliveries by truck.

Honest efforts have been made by some manufacturers to overcome these inequalities. One of these efforts was the imposition of a differential above the base price on deliveries to customers' trucks at mill. Another effort took the form of complete elimination of the use of trucks.

To obtain figures from the industry generally of cement delivered to buyers' trucks at the mills, over the last few years, would I believe as to most companies, necessitate a large amount of laborious work. Probably it would mean going thru all invoices. However, I believe that the trucking figures shown on the large tabulation sheets for the four monthly periods are fairly representative and will indicate the total quantity trucked over any given period.

I do not know of any figures which have been prepared showing the exact additional costs at the various mills occasioned by making deliveries to buyers' trucks at the mill or by trucks to destination. Such costs would vary as between mills and at a given mill they would vary as between different deliveries on different days and even on a single day, due to conditions at the loading platforms at the particular times that deliveries to the trucks were desired. Various differentials were used by different mills but fifteen cents came to be recognized by a numbers of mills as a satisfactory differential to cover the inconvenience and additional costs involved." (Com. Ex. 971-15 F-G)]

[Letter dated August 8, 1935, Dr. J. M. Clark to Blaine S. Smith, President, Penn-Dixie:

"Your letter and enclosures have arrived. The trucking problem remains a tangle. The feature of

it that seems to need to be met somehow is the fact that the customer who can use trucks gets an advantage, corresponding to a real economy; and if he is a dealer he may pass it on to customers; and for that reason the trade wants it kept from him. It appears also that the kind of competition that prevails in this industry cannot be trusted to bring a charge for trucking service commensurate with the cost to the producer of making this kind of deliveries, so that the market may not accurately register the real economy, if any, of this kind of movement. But the big thing seems to be the disrupting effect on the price structure and on the certainty of what the delivered price or cost is that a seller has to meet. I am wondering whether the trade really needs such complete certainty in this respect as it likes to insist on. Or is this in part perhaps a result of a state of mind, left over from pre-trucking days, which considers it necessary to meet by a general price cut any low-price delivery that may be found in the field, even a sporadic one due to somebody having some trucks that would be moving empty and that can be used for a cement delivery with little added cost? If such sporadic cases were allowed to get by, would they perhaps tend to come out in the wash, without the necessity of disrupting the price system? I admit this does not meet all the difficulties noted in the Penn-Dixie correspondence on this subject.

Where local trucking is strongly established it seems to have made its place in the system; and it seems that this place might be extended without serious results. As to longer-distance trucking, there is the probability of rate regulation; but I am not impressed with the prospect of removing all the difficulties in this way.

As to the disrupting effects on the price structure, I am reminded of a Civil War story of some troops bivouacking, who asked their officer to let them take the farmers' fences for fuel. He finally told them they might take the top rail. In the morning the fences were gone, but nobody had taken any but the top rail. Does the nibbling at the price structure that results from trucking necessarily

work in this cumulative fashion, or can its effect be limited so that it will be less destructive? That question is bothering me.'' (Com. Ex. 971-19 D)]

[Letter dated August 20, 1935, Blaine S. Smith, President, Penn-Dixie to Dr. J. M. Clark in reply:

"In replying to your letter of August 8 relative to the problem of trucking cement I would like to quote for emphasis two statements contained in my letter of July 3 to Dr. Burns:

'Trucking of cement is a complicated matter.

Cement, being a standardized product, must be sold to all customers of the same class, at the same place, at the same time, at the same or substantially the same price.'

The Cement Industry does not desire to withhold from a customer or consumer any possible economy in their purchases of cement. As a matter of fact it is not only desired but necessary that cement be sold at the lowest possible price in order to prevent its substitution by other competing materials. However, in following this minimum price policy the manufacturer must give full consideration to the uniform price situation as quoted in the first paragraph above. Otherwise it would cause a disruption of marketing conditions as between the manufacturers' customers who would become dissatisfied and critical.

It is a doubtful statement that the kind of competition that prevails in the cement industry cannot be trusted to bring about a charge for trucking service commensurate with the cost to the producer of making this kind of delivery. The fact of the matter is that it is practically impossible to definitely determine the actual cost of trucking due to the many facts which enter into the situation. As an illustration one manufacturer may be furnishing the cement on one or more projects requiring 1,000 or more barrels per day over a period of say 30 days. The per barrel cost of such trucking would be relatively low. However, during the following month

this manufacturer, although owning the same fleet of trucks may have only a few sporadic shipments.

The per barrel trucking cost on these sporadic shipments of course would be unreasonably high. Also if quotations for trucking services are requested from a number of independent trucking companies a very wide variation is always found in these quotations. It is absolutely necessary that the uniform price policy quoted in the first paragraph be maintained by the manufacturers to prevent the disruption of the markets of their customers and to prevent the dissatisfaction and criticism by their customers which would otherwise result. Even in cases where the railroad freight rates vary to two destinations close together geographically which serve the same territory it is usually found necessary to make some adjustment thru the medium of establishing the lower of the two prices at both of the points. Otherwise all of the business in the general community could be done by the customer having the lowest freight rate and consequently the lowest price.

Much dissatisfaction and criticism of the manufacturer among his customers is caused even if a single sale, although relatively small, is made by one of the manufacturer's customers who has a slight price advantage over his other customers in the same general location.

May I emphasize the point that trucking is objectionable, not only from the manufacturer's point of view, *but more especially from the point of view of his customers* for the reasons stated. The building material dealers have, on many occasions, been active and vigorous campaigners for the elimination of trucking.

If trucking rates were uniformly fixed and were definitely known, as is the case with railroad freight rates, and it could be arranged so that cement could be delivered only by trucks owned or operated by the manufacturer, the delivered prices could be made by adding the uniformly fixed trucking rates to the base price, but even then the trucking of cement would disrupt the customer's markets. This

disruption would be due to the fact that the manufacturer's customer who is close enough to that manufacturer's plant to truck his shipments could make deliveries at the various job sites in his community at the delivered price so fixed. However, the manufacturer's customer in the same locality who was too far away from that manufacturer to avail himself of trucking would be forced to take delivery f.o.b. cars on railroad sidings at the delivered prices so fixed and would then have the additional expenses of trucking the cement from the cars to the job sites.

A situation of this kind exists today in the marketing area surrounding Toledo, Ohio where trucking exists. The delivered prices both for trucks and railroad cars, were made by adding the fixed railroad freight rates to the base price. So much dissatisfaction among the manufacturer's customers was created by the arrangement that a reduction of 8¢ per barrel in the rail delivery price was recently made to offset the advantage of truck delivery at the job site.

Another illustration of how trucking would disrupt the markets of the manufacturers' customers even if trucking rates were fixed and definitely known is this: If a manufacturer should use the trucks of his customers and make an allowance to his customers of the uniform rate fixed for trucking, then the undesirable features would be greatly increased. One customer might feel that since he already had trucks which were not being used, that the cement was being delivered at little added cost above mill price while another customer might take into consideration all of his trucking costs including depreciation and interest on his money. The latter customer of course would not feel that he could meet the prices at which the first mentioned customer would resell his cement.

It is quite true that any deviation from the uniform price structure works in cumulative fashion and cannot be limited to a few isolated cases without doing serious harm." (Com. Ex. 971-20 Z-21 A)]

[Letter dated August 27, 1935, John Treanor, President, Riverside to Dr. J. M. Clark in reply to letter dated August 7, 1935 from Clark:

"I can't untangle the trucking problem. A large part of the difficulty *is* a 'state of mind.' It is the same perennial state of mind, however, which makes every cement man apprehensive at the slightest departure from the declared price whether related to trucking or to other conditions. No doubt he could profitably ignore all sporadic cuts which, however, in practice, he acts upon with disastrous results. This 'state of mind' prevents us from believing that our competitors ever fight softly. We believe they mean everything they do, with all the implications. We don't give our competitors credit for any charity, consideration or self-abnegation at all. We believe they will exploit every advantage that the rules of the game do not forbid.

Practically, if the will is there to do it, a concern which wants to exploit trucking, can, because of the looseness and uncertainty of trucking rates arising out of the 'overhead', 'idle capacity' and other uncertain factors in that form of transporation bring about disorder and indefiniteness in the price structure of any market; and if this form of competition isn't met, all the available business can be swept up by one concern, to the limit of its capacity. Give me half a cent a barrel advantage and I'll sweep any market, or I'm incompetent.

Further, trucking is a tangle because it is itself in such a state of change. Costs change every day with changing equipment; new forms of organization of truck transportation are constantly appearing, new, arbitrary rules are constantly being made, by various government units, or by their public utility bodies.

As a nation, we just have to adjust ourselves to trucking. So long as the adjustment remains uncertain, it is inevitable that an industry like ours will seek temporary relief by reducing the menace as far as possible through its own regulations. What it can't fit in this way, it has to live with." (Com. Ex. 958-4 F)]

[The answer of Lehigh to Question 10A, B, of the Burns-Clark Questionnaire in 1935 is as follows:

"From 1925 to 1932 we had no uniform method of calculating prices for truck delivery sales. During this period trucking was general in our markets. For a time our competitors and ourselves quoted prices f.o.b. buyers' trucks at the mills. The buyer, however, compared prices, not on the basis of f.o.b. mill figures, but on the basis of his cost at destination. One manufacturer might quote $2.00 per barrel at his mill, another $1.95, but if the buyer found his trucking costs to be 20¢ per barrel from the first mill and 26¢ per barrel from the second, be bought from the first mill. In practice, therefore, the manufacturers began to make special allowance to buyers in individual markets, in an effort to meet the costs at destination of cement from more favorably located mills.

An example may be helpful: Bethlehem, Pa., is a city of 50,000 population and a fairly large cement market. Several of the mills in the Lehigh Valley group are at Bath, Pa., about five miles from Bethlehem. Another group of mills, around Northampton, Pa., is about twelve miles distant. Both groups of mills, in June, 1925, were selling generally for delivery to trucks at their base price of $1.75, but as the buyer's trucking cost to Bethlehem was 15¢ per barrel from Bath and 20¢ from Northampton, most of the latter mills allowed buyers in Bethlehem a deduction of 5¢ per barrel, or sold at the equivalent of a $1.70 mill price, in an effort to place themselves on a competitive basis with the Bath mills.

This is a typical case. Even though mill prices were quoted, the buyer purchased on the basis of his cost at destination and the mill prices were really figured back from the destination cost to the buyer of cement from the most favorably located mill.

Hence, during the period from 1925 to 1932, some of our sales for truck delivery were at our base price f.o.b. mill, some at f.o.b. mill prices lower than the base, some had delivered prices f.o.b. trucks at destination (using hired trucks). For a time also,

for reasons explained below, we sold at a mill price 15¢ per barrel higher than our base price.

Sales of cement for truck delivery began about 1920, during a time of general car shortage. There were also periods of rail transportation difficulty or car shortage during 1921 and 1922. For a year or two thereafter there was a general feeling that the use of trucks, where trucking transportation costs were lower than rail freights, was an economic advantage to manufacturer, retailer, contractor and consumer. It became evident, however, that any such advantage was off-set by some serious disadvantages.

[Italicised part quoted in Fdgs. Par. Eleven (b)]

(1) *The manufacturer, striving to figure his prices on indeterminate and fluctuating trucking rates and to meet the equally fluctuating and indeterminate rates from his competitors' plant, quickly found himself engaged in blind, reckless and destructive competition.*

(2) The retail building material dealer found his market invaded by dealers from far distant points. The distant dealer, buying from some manufacturer who sold at a reduced mill price to meet the competition of a mill more favorably situated to his market, might deliver the cement to some intermediate market where he would normally do no business, to the demoralization of that market. The majority of cement dealer accounts are arranged on the basis of the manufacturer giving a dealer in a market the exclusive sale of that manufacturer's brand. Naturally, when an outside dealer made a sale of the sort described, the local dealer handling that brand felt that the manufacturer had broken faith. Cases of this kind were numbered by the hundred and created a general demand from the building material dealers that the cement industry discontinue truck sales. This sentiment grew steadily in strength and made an increasing impression on the cement manufacturers who must depend on the retailer as his market for a large proportion of their output. The dealer also contended, we think

soundly, that accepted marketing practices of thirty years standing had established the carload as the wholesale unit, and that when the manufacturer sold in a small unit for truck delivery he was in reality invading the retail field.

(3) Contractors found that they could not depend on any degree of stability in cement prices. A contractor bidding a job faced the danger that his competitor might have a cement cost so much lower that this item alone might determine the award. There were numerous protests from contractors that trucking practices caused discriminations and inflicted injury.

(4) It may appear that conditions like these worked to the advantage of the final consumer, the owner of the construction project, who is the man who finally pays the bills. Unquestionably, the manufacturer's sales practices must meet the ultimate test of fairness to the consumer. It is our firm belief that the trucking practices of the cement industry from 1925 to 1932 were not fair to the consumer. The apparent price advantage was more frequently the result of guerilla warfare among the manufacturers engaged in blind competition on unknown and often fictitious truck delivery costs, rather than an economy inherent in the method of transportation. This guerilla competition was waged most fiercely after a construction contract had been awarded, with the result that the larger part of its fruits did not reach the consumer, the advantage being retained as an added profit by the contractor or by the retailer who supplied the contractor.

From time to time attempts were made by individual manufacturers to establish practices that might relieve the chaotic conditions resulting from trucking abuses. One of these efforts involved charging a mill price for trucking at 5¢ per barrel above the prevailing mill base price. This so-called differential was based on the fact that the cost to the manufacturer for loading trucks was higher than the cost of loading cars, so that a truck price equal to the mill price really subsidized truck deliveries

as compared to car shipments. Our company adopted this practice for a time where competition permitted, but the practice was short-lived and was never generally observed by all mills.

By 1932 it was clear that trucking practices were one of the chief contributory causes of the state of chaos and demoralization in which the industry found itself. When about August 1932, one manufacturer announced he would no longer load trucks but would sell only in carload lots, his action was met by practically all manufacturers in the Lehigh Valley area. This action was primarily the result of the desperate condition of the industry and the general realization that only by the elimination of the destructive practices associated with trucking could there be any hope of improvement. Another factor which carried considerable weight, was the fact that the hostility of the retail dealer to trucking practices was so intense that the manufacturer making the announcement would have gained a great competitive advantage over any other manufacturer who might not have followed the move.

Answering the latter part of the question our present policy of not selling for truck delivery has given rise to no difficulties with the trade. On the contrary, the policy is accepted as most desirable and its abandonment would unquestionably arouse a storm of protest." (Com. Exs. 969-14 M, 14 N, 14 O)]

B. Extent of Delivery to Customers' Trucks: Demand.

1. Statistical Data

The evidence in the record on this subject is set forth for Bureau of Mines Districts Nos. 1 through 10 in the charts that follow. Under the heading "Burns-Clark Data" the percentages are computed from answers to the Burns-Clark questionnaire which show figures for only the four months of June, 1925, January, 1928, June, 1932 and January, 1933. Under the heading "Other Data" the percent-

CHART VI-A

EXTENT - DELIVERY - CUSTOMERS' TRUCKS

DISTRICT NO. 1

BURNS - CLARK DATA

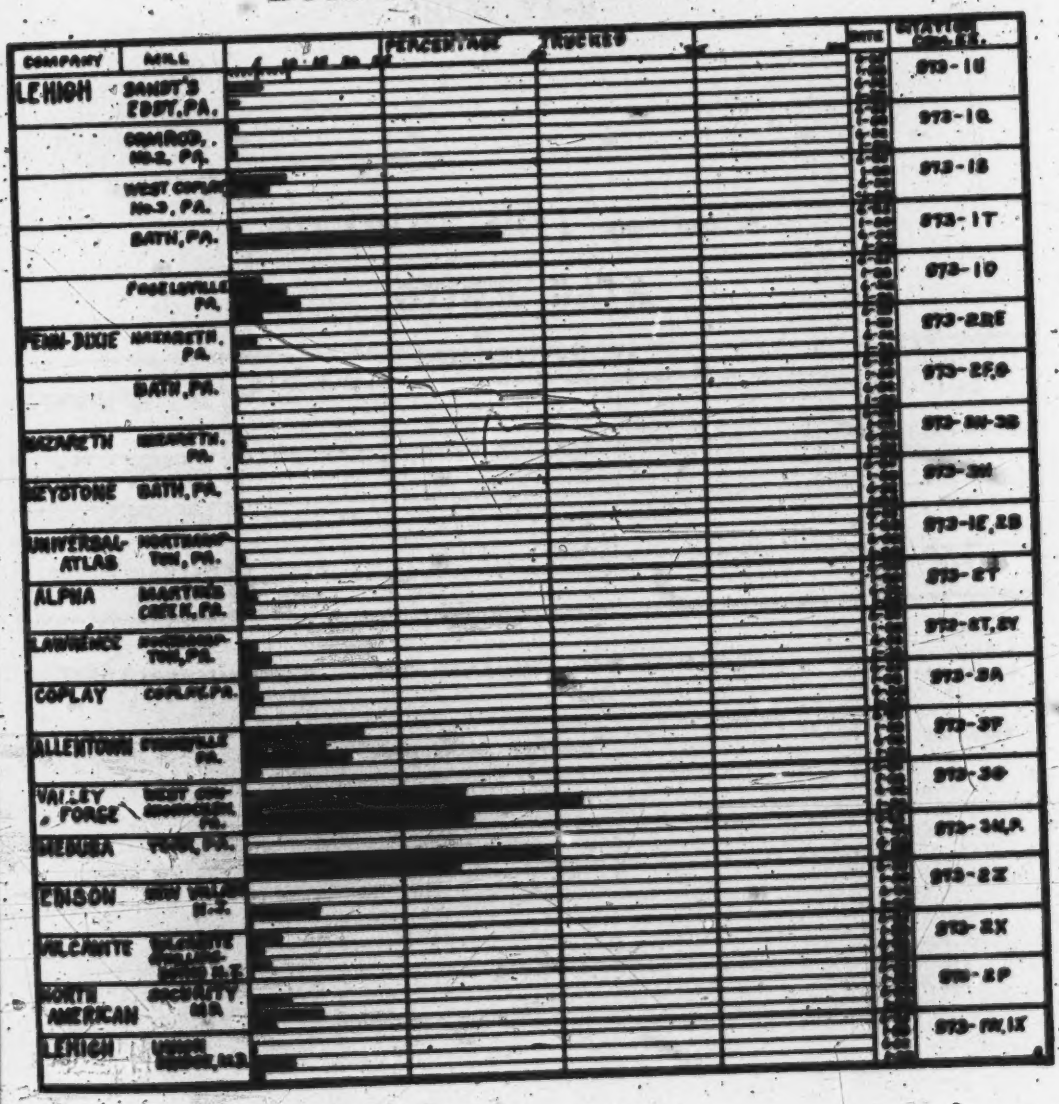


CHART VI-B

DISTRICT NO.1 (CONTINUED)

OTHER DATA

COMPANY	MILL	PERCENTAGE TRUCKED	CITATION
KEYSTONE	BATH, PA.		1356
ALPHA	NORTHAMPTON, PA.		703
HERCULES	[illegible]		1064
EDISON	NEW VILLAGE, N.J.		2554

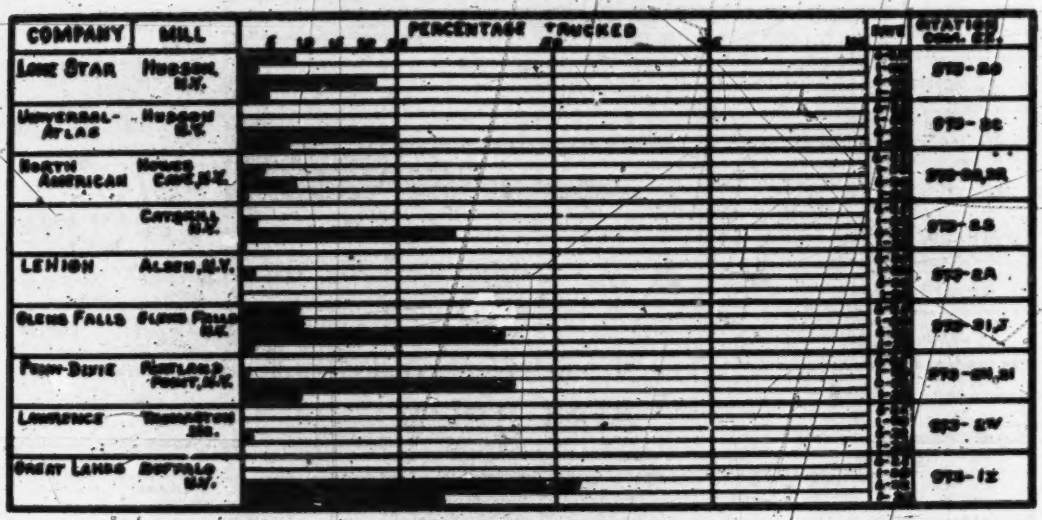
WHITEHALL, NORTHAMPTON, PA. - "About 500 barrels - about two of 1%." 1630 Tr. 28540

LONE STAR - - "Very little trucking." Tr. 28,857

CHART VI-C

DISTRICT NO. 2

BURNS~CLARK DATA



OTHER DATA

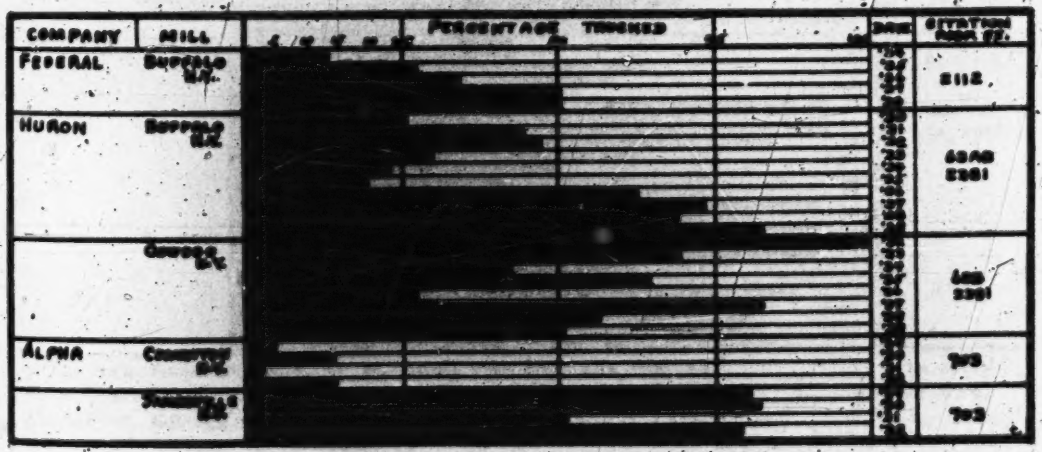
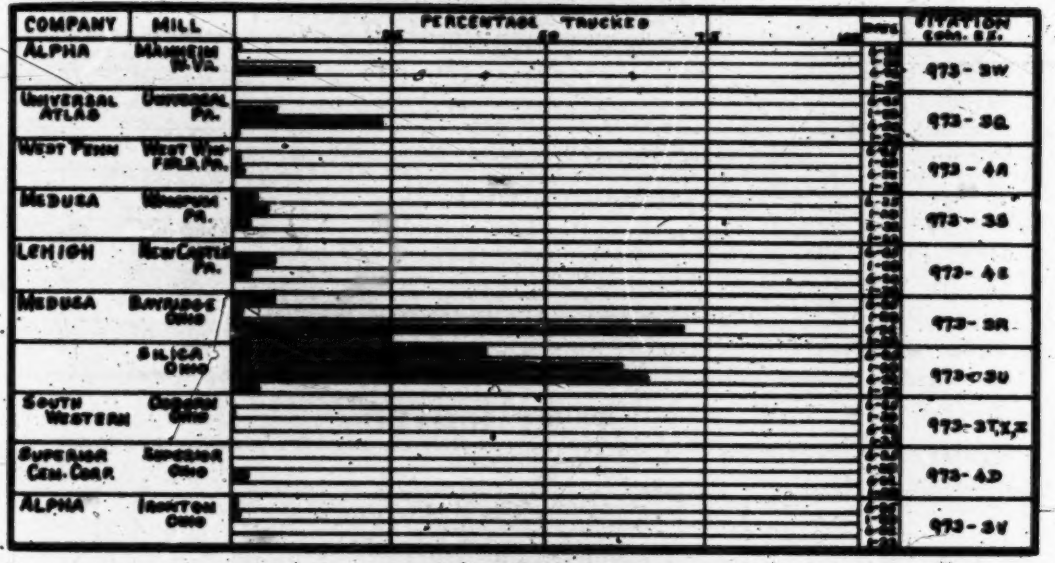


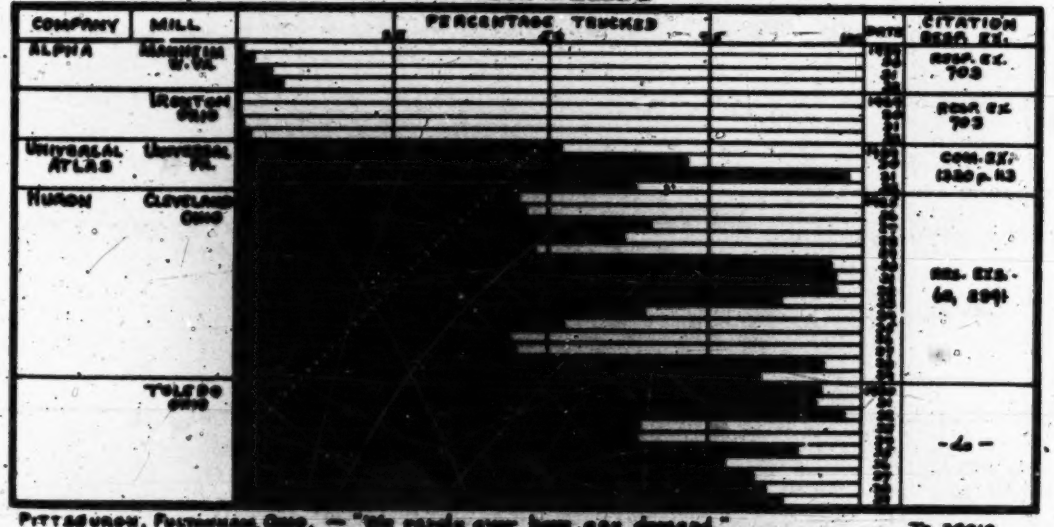
CHART VI-D

DISTRICT NO. 3

BURNS-CLARK DATA



OTHER DATA

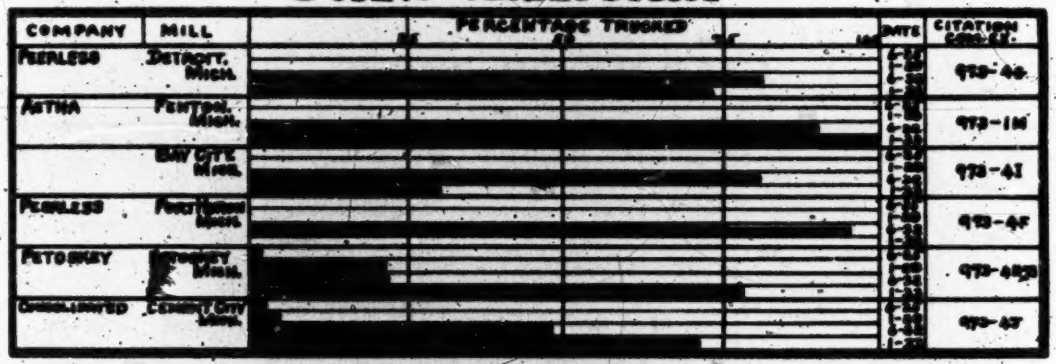


PITTSBURGH, FULTONHAM, OHIO, — "We rarely ever have any demand." Tr. 28019
WEST PENN, WEST WINFIELD, PA. — "Always a relatively small percentage." Tr. 27790
GREEN BAG, NEVILLE ISLAND, PA. — Over period 1919 through 1921 about 29.6%. Com. Ex. 1280 p. 70
W. Va., "A few requests." Tr. 29021-22, 29019-20
SOUTHWESTERN, OREGON, OHIO. - "One or two instances in outlying rural districts." Tr. 29447
DIAMOND, MIDDLEBOURNE, OHIO, - "80% of total shipments - 1921." Com. Ex. 1624
MEDUSA, WAMPUM, PA. - "90,262 barrels in 1921." Res. Ex. 3262-A
SILICA, OHIO, - "271,870 barrels in 1921."
BAY RIDGE, OHIO, - "115,585 barrels in 1921."
WABASH, OREGON, OHIO. - "About 100,000 barrels in 1921." Com. Ex. 1708

CHART VI-E

DISTRICT NO. 4

BURNS-CLARK DATA



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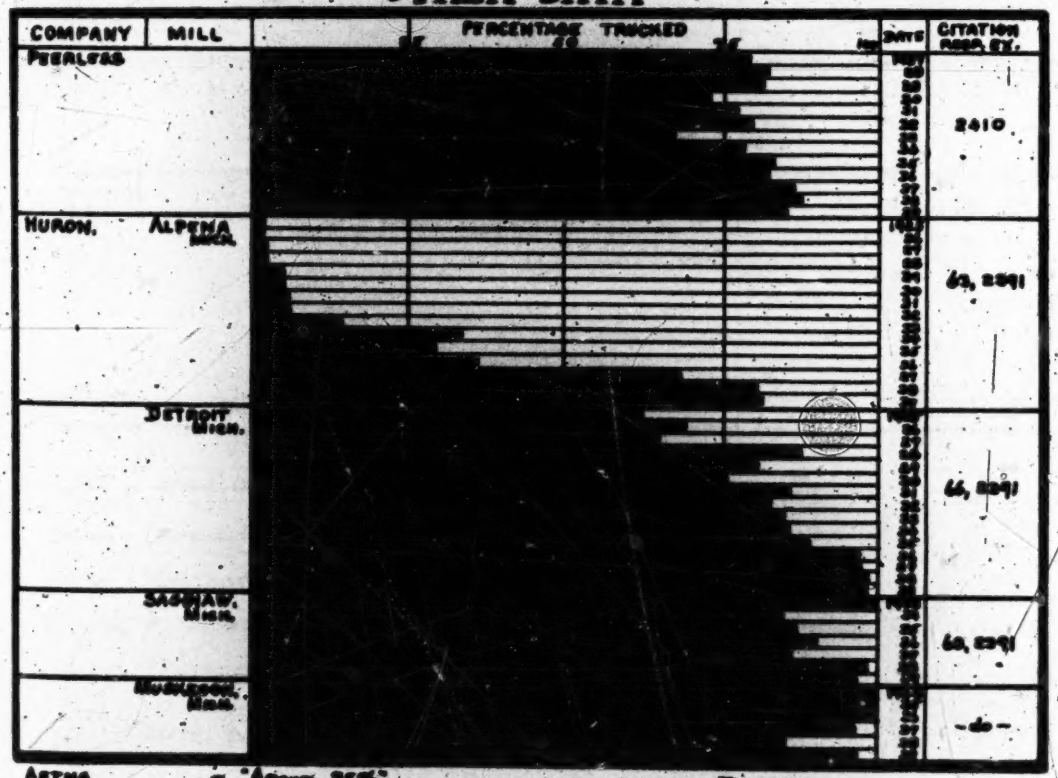


AETNA, - "ABOUT 75%".

MEDUSA, NEWAYGO, MICH. "80,870 BARRELS - 1931."

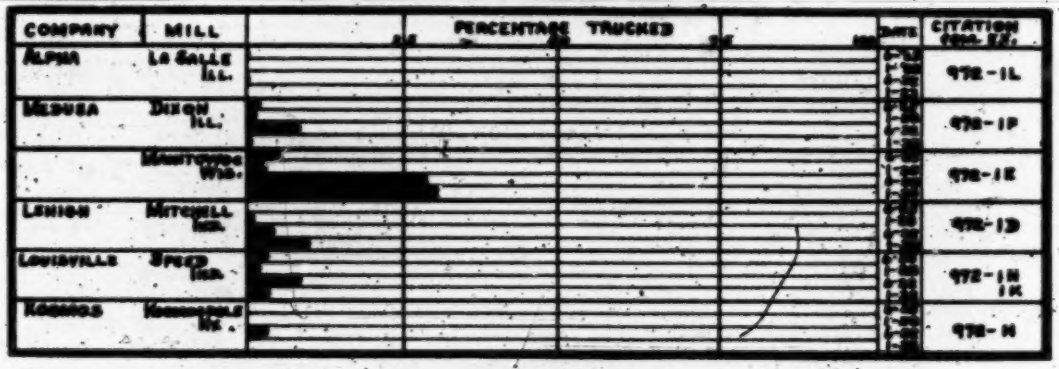
TR. 30137

RESP. EX. 3263-A.

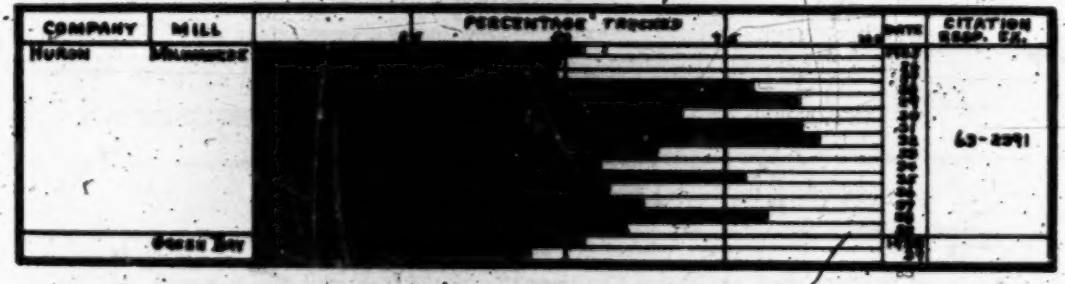
CHART, VI-F

DISTRICT NO.5

BURNS-CLARK DATA



OTHER DATA



ALPHA, LA SALLE, ILL. – "Never any demand for it." TR. 24759

KOSMOS, KOSMOSDALE, KY. – "Less than 8%." TR. 27070-71

LEHIGH, OGLESBY, ILL. – "Never trucked from this mill." TR. 26891

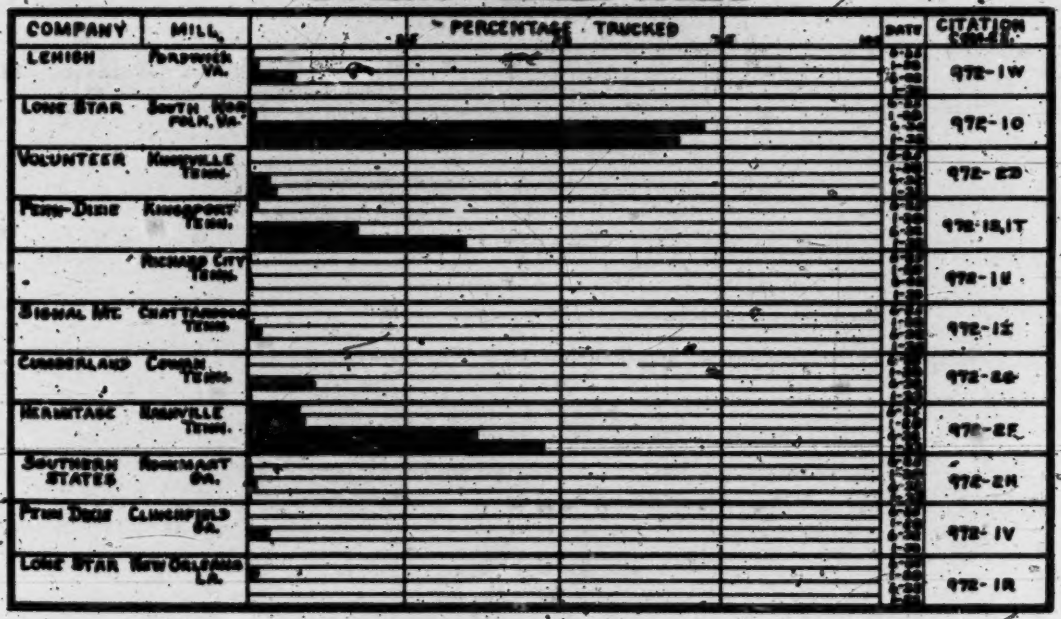
UNIVERSAL ATLAS, BUFFINGTON, IND. – "About 1,000,000 barrels into CHICAGO annually." COM. EX. 1803 T T.

MEDUSA, MANITOWOC, WIS. – "328,486 barrels in 1931." REBT. EX. 3263 A
"77,844 barrels in 1936." " " 3265
"110,688 " " 1937." " " 3266
DIXON, ILL. – "17,430 " " 1931." " " 3264A

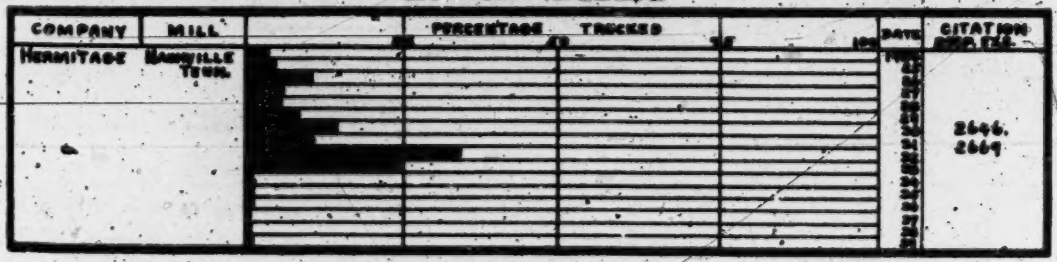
CHART VI-G

DISTRICT NO. 6

BURNS-CLARK DATA



OTHER DATA



VOLUNTEER, KNOXVILLE, TENN. – "20,851 barrels – June 1, 1932 through November 8, 1938." RESP. EX. 2193

ALPHA, PHOENIXVILLE, ALA. – "No trucking, never any request for it." TR. 22646, 24759

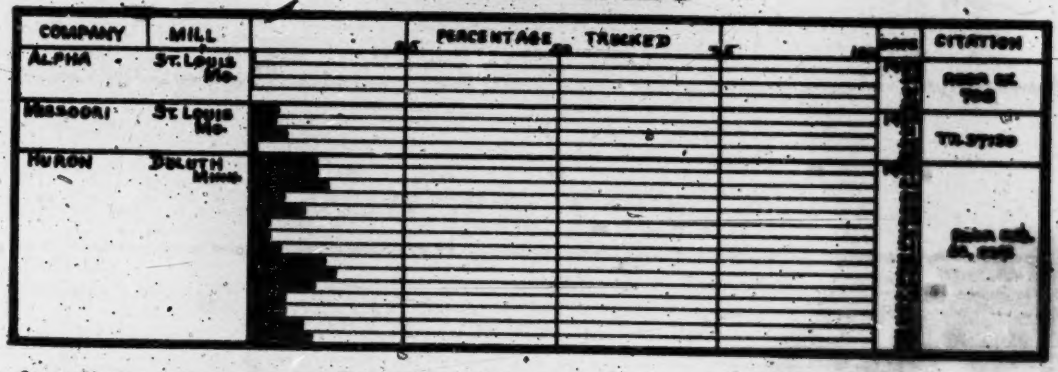
NATIONAL, – "Never sufficient demand." TR. 34537

CHART VI-H

DISTRICT NO. 7

BURNS-CLARK DATA

OTHER DATA



SOUTH DAKOTA, STATE PLANT – "Less than 10%." TR. [illegible]

DEWEY, DAVENPORT, IOWA. – "In 1921 - 106,924 barrels." Com. Ex. [illegible]

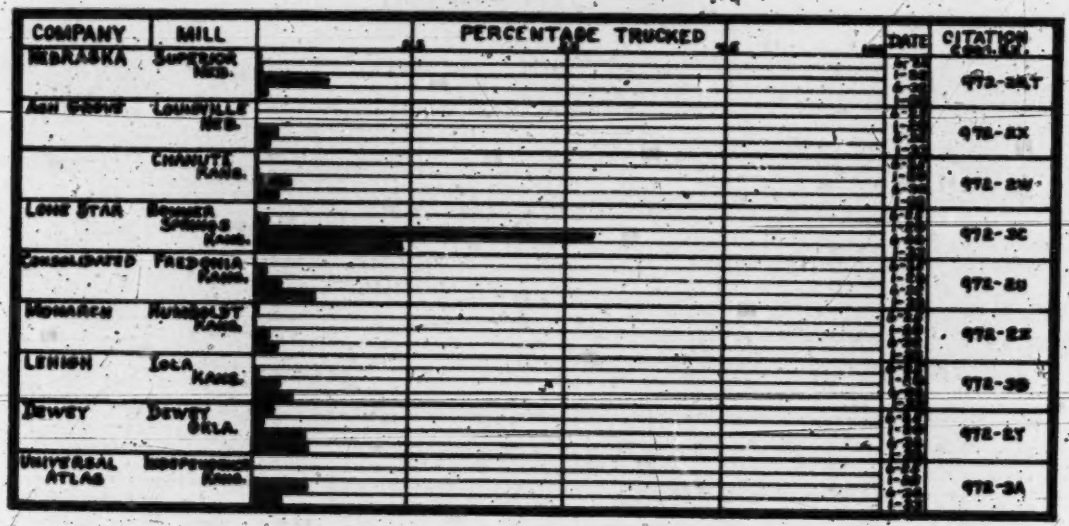
NORTHWESTERN STATES, MASON CITY, IOWA. – "Never any demand." TR. [illegible] – [illegible]

MARQUETTE, CAPE GIRARDEAU, MO. "Very little." TR. [illegible]

CHART VI-I

DISTRICT NO.8

BURNS-CLARK DATA



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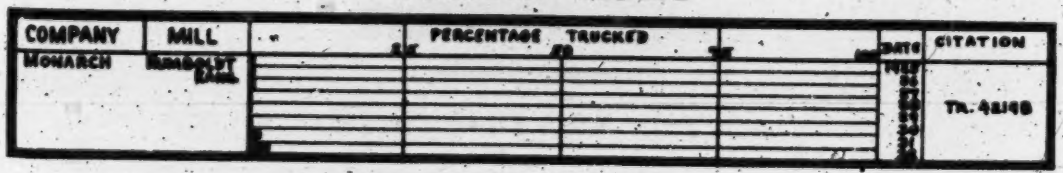
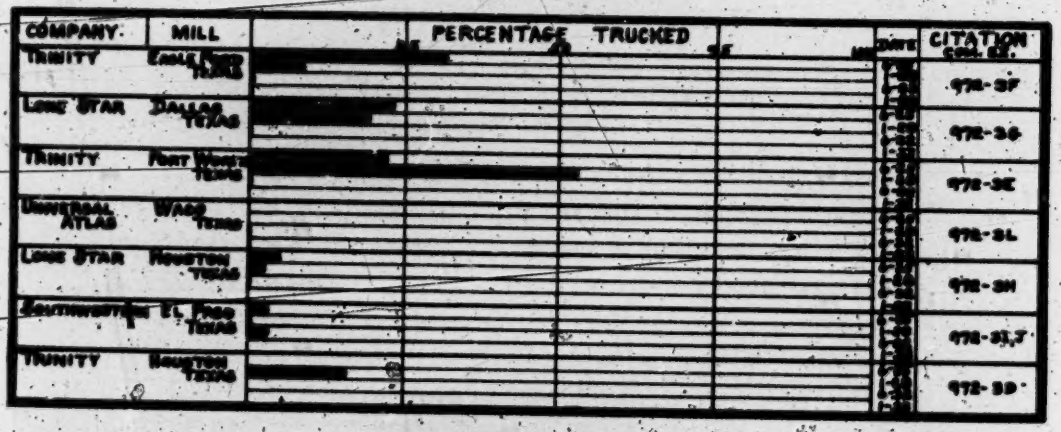


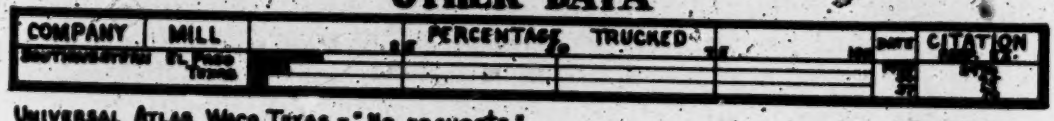
CHART VI-J

DISTRICT NO. 9

BURNS-CLARK DATA



OTHER DATA



UNIVERSAL ATLAS, WACO, TEXAS.- "No requests."

TR. 35150

DISTRICT NO. 10

BURNS-CLARK DATA

ages are taken from any other statistical data in the record and these are charted separately because of the different periods of time than shown in answers to the Burns-Clark questionnaire. In some cases where there is no statistical data of any sort for a particular company general testimony on this subject is set forth very briefly at the foot of each chart.

2. Delivery to Trucks at Packing Plants, Silos and Warehouses and Delivery in Company Controlled Trucks

What follows is a statement of (1) the evidence showing the location of packing plants, silos and warehouses of producers together with the dates when they were established and when given up. At all of these points sales are made to buyers' trucks. Evidence on price policies for such sales is digested in sections D, E and F below; and (2) the evidence showing from what mills, silos, packing plants and warehouses deliveries are made in company controlled trucks. The term company controlled trucks covers all trucks owned or hired by the producer and used to deliver cement to the customer's warehouse or job site at a delivered price. Evidence as to price policies for such sales is digested in sections D, E and F below. Statistical data as to the amount of cement delivered in company controlled trucks is included in the figures in the charts *supra*, pp. 1415-24 because in most cases these figures include both this form of truck delivery and delivery to the customer's trucks at the mill and segregation may only be approximated.

a. Points along the Great Lakes

Huron has its main manufacturing plant at Alpena, Mich., on the shore of Lake Huron.[1] From here cement is carried in bulk by boats to a number of auxiliary storage

[1] (C) Tr. 11238.

and packing plants built at different dates at points on the Great Lakes, as follows: Detroit (1911), Cleveland (1916), Duluth (1917-18), Milwaukee (1923), Buffalo, (1928), Toledo (1929), Oswego (1932-33), Saginaw (1932-35) and Muskegon (1937).[2] In March, 1933 Huron started quoting delivered prices and performing the transportation service in company controlled trucks and thereafter most of its trucking was done in that way.[3]

Aetna established distributing warehouses in Ohio, Michigan and Wisconsin between 1930 and 1933 as follows: at Detroit, Cleveland, Toledo, Port Huron, Bay City, Grand Haven, Menominee, Green Bay, Racine and Sault St. Marie, in about the order named.[4] Aetna closed these warehouses between the fall of 1936 and April 1938 and started delivery in hired trucks from its mill to points all over Michigan, some around Toledo and northwestern Ohio.[5]

Peerless delivers in company controlled trucks from its Detroit and Port Huron, Mich., mills and also loads customers' trucks but the latter was only a small amount.[6]

Universal Atlas established warehouse facilities from which truck delivery is made to meet truck competition from competitive mills at the following points in the Great Lakes region: Milwaukee and Green Bay, Wis., Muskegon and Menominee, Mich., Chicago, Ill., Cleveland, Ohio and Oswego, N. Y.[7] Deliveries are made not only

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[2] Resp. Exs. 47, 2392.

[3] Crapo, Vice President, Huron (C) Tr. 11260; Meyers, Traffic Manager, Huron (R) Tr. 33345-46.

[4] Cree, Sales Manager, Aetna (C) Tr. 510-12, Com. Ex. 17.

[5] Calvin, President, Aetna (R) Tr. 29979-80, 30128, 30137, 30189-90.

[6] Russell, Vice President, Peerless (R) Tr. 34254-55, 34271.

[7] Stone, Vice President, Universal Atlas (R) Tr. 35135, 35173, 35229-30.

to customers' trucks but also in company controlled trucks from the Milwaukee and Cleveland warehouses.[8] Trucking in company controlled trucks from the Buffington, Ind. mill started June 4, 1934 and is limited to parts of lower Michigan.[9]

Alpha maintains warehouses at Milwaukee and Green Bay, Wis., and at Bellevue, Mich. from all of which deliveries are made to customers' trucks or Alpha delivers in hired trucks.[10] For a time Alpha maintained a warehouse at Cleveland, Ohio but it has been abandoned.[11] Alpha also delivers in hired trucks from its Jamesville mill near Syracuse, N. Y. Its tonnage was dwindling so rapidly due to truck competition at Oswego, N. Y. that it was compelled to take this step.[12]

Lehigh makes deliveries in company controlled trucks from its affiliate, Great Lakes, Buffalo plant[13] and so does Federal from its mill.[14] Great Lakes has a clinker grinding plant and silo at Cleveland from which deliveries are made to trucks. Clinker is brought by boat from Buffalo.[15] Lehigh also began operating a warehouse at Oswego, N. Y. in 1938 from which deliveries are made to customers' trucks[16] and it also maintained for a time warehouses at Chicago and Milwaukee.[17]

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[8] Stone, Vice President, Universal Atlas (R) Tr 35157-58, 35152.

[9] Id., Tr. 35181-83, Resp. Ex. 2518.

[10] Coogan, Vice President, Alpha (R) Tr. 23651, 23719-20, 23727; Fellows, Sales Manager, Alpha (R) Tr. 25814.

[11] Coogan, *supra*, Tr. 23651, 23728-29.

[12] Id., Tr. 23652-53, 23683-85, 23687.

[13] Bowen, Vice President, Lehigh (R) Tr. 26878-79.

[14] Bates, J. E., Sales Manager, Federal (R) Tr. 30491, 30629-30.

[15] Bowen, *supra*, Tr. 26880-81.

[16] Id., Tr. 26882-83.

[17] Id., Tr. 26886-89.

Bessemer and Medusa both maintained warehouses at Cleveland, Ohio for a time.[18] Later both companies shipped into Cleveland by company controlled trucks.[19] Pittsburgh established warehouses at Bowling Green and Defiance, Ohio, to meet the truck competition of Huron and Medusa. From these it sold in company controlled trucks.[20]

Wolverine trucks in hired trucks from its mills at Coldwater and Quincy, Mich. into whatever part of its sales territory it has to meet truck competition.[21]

Medusa, through its wholly owned subsidiary Manitowoc, built a silo and packing plant at Milwaukee in 1926. Bulk cement is received by boat from the Manitowoc plant and packed at Milwaukee. Cement is delivered to customers' trucks at this plant or delivered in company controlled trucks.[22] A silo was also established at Chicago in 1926 and deliveries to and by trucks are made in the same way as at Milwaukee.[23] Medusa opened a warehouse at Holland, Mich. in 1933 but closed it in the spring of 1937.[24] It was in the spring of 1932 that Medusa began delivering in company controlled trucks to meet competition.[25]

Petoskey maintains silos at Detroit, Chicago and Milwaukee at which deliveries were made to customers'

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[18] Warren, F. B., Vice President, Bessemer (R) Tr. 32284-85; Dawson, Vice President, Medusa (R) Tr. 40036.

[19] Warren, *supra*, Tr. 32252; Dawson, *supra*, Tr. 40036.

[20] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37851-53, 37871, 37874-76.

[21] Nelson, J. L., Vice President, Wolverine (R) Tr. 35918-19; Resp. Ex. 2634.

[22] Dawson, Vice President, Medusa (R) Tr. 40033-34.

[23] Id., Tr. 40034-35.

[24] Id., Tr. 40038.

[25] Id., Tr. 40071-72.

trucks.[26] Petoskey also delivers in company controlled trucks from its Petoskey, Mich. mill to dealers all over the lower peninsula of Michigan.[27]

b. Other Sections

At Pittsburgh, Universal Atlas established a trucking station in 1930 or 1931 at a cost of over $200,000 nearer to the heart of Pittsburgh than its mill at Universal, Pa., which is some 16 miles out. This was done to meet the competition of Green Bag, Pa. with its mill located in the city limits.[1] Pittsburgh with its mill at Fultonham, Ohio also has a little warehouse in Pittsburgh to meet this same competition[2] and for a time Lehigh did also.[3] Medusa, with its nearest mill 45 miles from Pittsburgh, has a warehouse in the city.[4]

At Washington, D. C., six companies have silos or warehouses from which deliveries are made to customers' trucks[5] while at Miami, Florida four companies have warehouses.[6]

At Southwestern's El Paso, Texas mill both buyers' trucks and company controlled trucks are loaded.[7]

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[26] Lucas, Vice President, Petoskey (R) Tr. 38787-88, 38838, 38688, 38722.

[27] Id., Tr. 38721, 38724, Resp. Ex. 2946.

[1] Stone, Vice President, Universal Atlas (R) Tr. 35181-85.

[2] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37850.

[3] Bowen, Vice President, Lehigh (R) Tr. 26869-70.

[4] Dawson, Vice President, Medusa (R) Tr. 40037.

[5] Alpha (R) Tr. 23651; Lehigh (R) Tr. 26865-68; Lone Star (R) Tr. 32866-68; Universal Atlas (R) Tr. 35176; North American (R) Tr. 33922, 33929-31; Medusa, Com. Ex. 3118 L.

[6] Alpha (R) Tr. 23651; Florida and Lehigh (R) Tr. 26883-84; Universal Atlas (R) Tr. 35177-78.

[7] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39343-44.

At Houston, Texas, Lone Star has a warehouse to meet truck competition of Trinity from its Houston mill.[8]

Marquette has warehouses at St. Louis and Memphis to which it makes deliveries by water.[9]

For a time Hercules delivered in company controlled trucks from its Stockerstown, Pa., mill.[10]

C. Loading Facilities for and Mill Problems in Handling Trucks.

In general, most cement plants in all parts of the country are designed for railroad car loading only and do not have adequate facilities for loading customers' trucks.[1] At a

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[8] Koch, Vice President, Lone Star (R) Tr. 32850-51.

[9] Wecker, President, Marquette (C) Tr. 13963.

[10] Brobston, President, Hercules (R) Tr. 26185-86.

[1] Aetna: Calvin, President (R) Tr. 30128.

California: Blair, J. A., Chief Clerk (R) Tr. 42475-77.

Coplay: Twamley, Vice President (C) Tr. 6789-90.

Cumberland: Pearson, Secretary-Treasurer (R) 39843-44; Resp. Ex. 3061: Cumberland announcement dated 8-10-32.

Dewey: Moore, R. W., Vice President (R) Tr. 46646-47, 47247.

Edison: Sweeney, Vice President (R) Tr. 35683-87; Resp. Ex. 2557 for id. was offered but rejected. This exhibit consists of a blueprint of the Edison plant layout.

Hawkeye: Manley, General Manager (R) Tr. 41627.

Hercules: [but testimony refers to Dexter] Brobston, President (R) Tr. 26182-83, (C) Tr. 10539-40.

Kosmos: Horner, President (R) Tr. 36955.

Lone Star: Koch, Vice President (R) Tr. 32859-60, 32863-64.

Lone Star: Neylan, Ass't General Sales Manager (C) Tr. 6121.

Monarch: Brooke, Vice President (R) Tr. 42199; Com. Ex. 976-8 K: Monarch answer to Burns-Clark questionnaire.

typical mill, cement is carried in bulk from storage silos to packaging machines and empty bags are placed on the machines. They are filled automatically and dropped to a belt conveyor. The conveyor carries bags to the door of a railroad car on a track running alongside the packing house. They are caught at the door of the car by a packer who hand-trucks the cement into position in the car.[2] Bulk cement is blown directly into special railroad cars by spout arrangements.[3]

National: Dannelly, Vice President (R) Tr. 39537.

Nazareth: Robeson, Vice President (R) Tr. 28094-96, 28448-50.

Nebraska: Hoenig, Sales Manager (R) Tr. 41964-65.

North American: Porter, President (R) Tr. 33847-50.

Penn Dixie: Browder, Traffic Manager (R) Tr. 38149-50.

Petoskey: Lucas, Vice President (R) Tr. 38728.

Pittsburgh: Letzkus, Sales Manager (R) Tr. 37856.

Republic (a non-respondent): Com. Ex. 976-2 S: Answer to Burns-Clark questionnaire.

Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38910, 38913.

Volunteer: Lewis, Manager (R) Tr. 31462-63.

Whitehall: Elliott, Vice President (R) Tr. 28543.

[2] Keystone: Scott, H. M., President (R) Tr. 27354-55.

Lone Star: Koch, Vice President (R) Tr. 32859.

Nebraska: Hoenig, Sales Manager (R) Tr. 41964, 42042.

South Dakota State Cement Plant: Hartley, Sales Manager (R) Tr. 41535.

Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38913

Volunteer: Lewis, Manager (R) Tr. 31463.

[3] Scott, H. M., President, Keystone (R) Tr. 27355.

The loading of trucks interrupts this normal mechanical car loading operation.[4] When trucks are loaded, instead of being carried by the belt conveyor, the bags are hand-trucked directly from the packaging machines to the side of the packing house and are loaded on the trucks.[5] At the Edison plant cement was first loaded into railroad cars which were then switched to a trucking platform and from this platform trucks were loaded.[6] Callaghan, a dealer and trucker, testified that Edison never complained to him that they had difficulty in loading trucks.[7] Variations of this practice have also been followed by Texas,[8] Washing-

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[4] Alpha: Coogan, Vice President (R) Tr. 23654.
Green Bag, West Va.: Wood, General Manager (R) Tr. 29897.
Keystone: Com. Ex. 969-12 S: Answer to Burns-Clark questionnaire.
Lone Star: Koch, Vice President (R) Tr. 32856, 32858-64.
Louisville (a non-respondent): Com. Ex. 975-18 o, 19 D: Answer to Burns-Clark questionnaire.
Nazareth: Com. Ex. 969-9 o: Answer to Burns-Clark questionnaire.
Penn Dixie: Browder, Traffic Manager (R) Tr. 38149-50.
Petoskey: Lucas, Vice President (R) Tr. 38726.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37854.
Southern States: Elcock, Vice President (R) Tr. 37549.
Superior Portland: Tongue, Secretary (C) Tr. 8440, 8460.

[5] Scott, H. M., President, Keystone (R) Tr. 27355-56.
Koch, Vice President, Lone Star (R) Tr. 32863-64.

[6] Sweeney, Vice President, Edison (R) Tr. 35684.

[7] (C) Tr. 7662-63.

[8] Com. Ex. 2375: Interoffice memo dated 6/22/36—C.E.C., Trinity, to J. F. Hayden;
Com. Ex. 2433: Id.;
Com. Ex. 1940: Interoffice memo 9/28/37, Boice, Universal Atlas to Smith;
Com. Ex. 1941: Interoffice memo 9/23/37, Binghone to Boice, Universal Atlas.

ton,[9] and Oklahoma mills.[10] At other mills carloading was slowed or halted while trucks backed across railroad tracks to the packing house platforms.[11] One manufacturer stated that added difficulty was caused at his Dallas plant by the fact that trucks of variable size did not fit the loading platforms; some were too high, others were too low.[12] A witness representing the Volunteer Company said that the records of his company showed that when everything is running smoothly, his plant can load railroad cars at about 400 barrels per hour and trucks at not more than 150 barrels per hour.[13]

Several manufacturers testified that packers work on a piece basis and that the additional labor involved in loading trucks created discontent among these workers.[14]

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[9] Com. Ex. 1204 A: Letter dated 7/17/31, Tongue, Secretary, Superior Portland, to Massar Lumber Co.

[10] Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46631.

[11] Green Bag, W. Va.: Wood, General Manager (R) Tr. 29897.
Huron: Townsend, General Manager (R) Tr. 33657-59. The witness referred to the situation at his Duluth plant.
Nebraska: Hoenig, Sales Manager (R) Tr. 41964.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38149-50.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38910. This witness referred to his El Paso plant. Counsel offered photographs (Resp. Ex. 2971-2973 for identification) showing the loading of trucks at this plant, but they were rejected.
Volunteer: Lewis, Manager (R) Tr. 31463.
West Penn: McKee, Vice President (R) Tr. 27794.

[12] Koch, Vice President, Lone Star (R) Tr. 32858.

[13] Lewis, Manager, Volunteer (R) Tr. 31472.

[14] Edison: Sweeney, Vice President (R) Tr. 35684.
Hawkeye: Manley, General Manager (R) Tr. 41627.
Keystone: Scott, H. M., President (R) Tr. 27356.
Lone Star: Koch, Vice President (R) Tr. 32858-59.
Nazareth: Robeson, Vice President (R) Tr. 28095.
North American: Porter, President (R) Tr. 33847.
Volunteer: Lewis, Manager (R) Tr. 31464.

Executives of fifteen companies testified that their major objection to the loading of customers' trucks as distinguished from company controlled trucks, was that customers' trucks would arrive irregularly, disrupting loading schedules and causing customer dissatisfaction at delay created by the bunching of trucks.[15] A Huron witness testified that from 1922 to 1927, during a period of great demand for cement in Detroit, customers who owned more equipment than others would "hog" the line. Huron resorted to a system of giving tickets in order that not more than three trucks of a particular customer would be loaded.[16] Two manufacturers testified that it was not as objectionable to load company controlled trucks as it was to load customers' trucks because loading schedules would be better adhered to in the case of company controlled trucks.[17]

There was also testimony that customers' trucks increased accident hazards.[18] At a number of plants it was

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[15] Alpha: Coogan, Vice President (R) Tr. 23654-55.
Bessemer: F. B. Warren, Vice President (R) Tr. 32264, 32284-85.
Coplay: Twamley, Vice President (C) Tr. 8289-90.
Edison: Sweeney, Vice President (R) Tr. 35684.
Hawkeye: Manley, General Manager (R) Tr. 41627.
Huron: Townsend, General Manager (R) Tr. 33657-59.
Lawrence: Ackerman, Sales Manager (C) Tr. 7273.
Lone Star: Koch, Vice President (R) Tr. 32858.
Nazareth: Robeson, Vice President (R) Tr. 28137, 28093-94.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38150.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 38019.
Southern States: Elcock, Vice President (R) Tr. 37548.

[16] Townsend, *supra*, Tr. 33639-40.

[17] Coogan, *supra*, Tr. 24774-75.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35920.

[18] Callaghan, Manufacturer of ready mixed concrete (C) Tr. 7639.

necessary for customers to use dangerous railroad crossings and at some plants accidents occurred.[19] An F.T.C. investigator testified that Condon, of Hawkeye, gave as one of the reasons for the elimination of trucking at his mill the fact that he discovered that the company might become subject to liability for accident or loss incurred by commercial truckers.[20]

There is considerable testimony that it costs more to load trucks than it does to load railroad cars.[21]

A witness from Federal, which ships about 40 to 50 per cent of its product by hired trucks, estimated that it costs about 6 cents per barrel more at the plant to handle truck

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[19] Dewey: Moore, R. W., Vice President (R) Tr. 46647.
Nazareth: Robeson, Vice President (R) Tr. 28095-96.
Nebraska: Hoenig, Sales Manager (R) Tr. 41964-65.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 38019.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38910.

[20] Royal, Attorney, F.T.C. (C) Tr. 12816-17.

[21] Aetna: Calvin, President (R) Tr. 30133.
Alpha: Coogan, Vice President (R) Tr. 23655.
Coplay: Twamley, Vice President (C) Tr. 6789-90.
Edison: Sweeney, Vice President (R) Tr. 35675.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29897.
Hawkeye: Manley, General Manager (R) Tr. 41628.
Lone Star: Com. Ex. 976-13 Y: Answer to Burns-Clark questionnaire.
Monarch: Brooke, Vice President (R) Tr. 42198-99.
Nazareth: Robeson, Vice President (R) Tr. 28098, 28135.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38149.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37854.
South Dakota State Cement Plant: Hartley, Sales Manager (R) Tr. 41535.
Southwestern: W. R. Blair, Sales Manager (El Paso) (R) Tr. 38913.
West Penn: McKee, Vice President (R) Tr. 27795, 27922.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35919.
Yosemite: Holmes, T. K., Vice President, Calaveras (C) Tr. 8760.

shipments than rail shipments.[22] Other manufacturers have testified it costs more to load customers' trucks than to load hired trucks because the company can control the hired trucks.[23]

One reason that loading trucks costs more than loading cars is that truck loads are in small quantities,[24] but each load requires the same invoicing and accounting services

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[22] J. F. Bates, Sales Manager, Federal (R) Tr. 30630, 30642; Resp. Ex. 2112: Federal Tabulation of Shipments by Truck.

[23] Alpha: Coogan, Vice President (R) Tr. 24774-75.

Huron: Townsend, General Manager (R) Tr. 33640-42.

Wolverine: Nelson, J. L., Vice President (R) Tr. 35919-20.

[24] Consolidated: Com. Ex. 976-5 J, id.

Colorado: Com. Ex. 967-11 R, 13 L, id.

Federal: Bates, J. E., Sales Manager (R) Tr. 30631-32.

Lone Star: Com. Ex. 976-13 Y. Com. Ex. 970-2 G: Answer to Burns-Clark questionnaire.

Neylan, Ass't General Sales Manager (C) Tr. 6121.

Monarch: Com. Exs. 976-8 K, 971-30 P-Q: Answer to Burns-Clark questionnaire.
Brooke, Vice President (R) Tr. 42199.

National: Dannelly, Vice President (R) Tr. 39537.

Nazareth: Robeson, Vice President (R) Tr. 28097-98.

Nebraska: Hoenig, Sales Manager (R) Tr. 41965.

Penn-Dixie: Browder, Traffic Manager (R) Tr. 38150.

Petoskey: Lucas, Vice President (R) Tr. 38726-28.

Southwestern: Warren, G. E., Vice President. The relative size of a truckload compared to a carload was an important factor when a decision was made whether or not to resume deliveries to trucks at Osborn. (R) Tr. 29133.

Wolverine: *Supra*, Tr. 35919, 36071.

that are required for the larger carloads.[25] A witness from West Penn testified that in loading trucks there was risk of loss in accounting for the total amount loaded.[26] A Lone Star executive testified that truck loading required additional checkers to check trucks and to collect receipts.[27]

In reply to a question why he did not mention the high cost of loading trucks in a letter to Professor Burns regarding the trucking problem (Com. Ex. 971-9 A-C), Brobston, President, Hercules, answered it was because he did not think it was important enough to mention at the time.[28] Robeson, Vice President, Nazareth, testified that he had never studied methods for improving the loading of trucks, and that he had no idea how much more it would cost to load a truck than it would to load a car.[29]

There is evidence also that some manufacturers received complaints from customers that cement transported by truck was damaged.[30] Irresponsible truckers would misrepresent the identity of their employers,[31] and losses oc-

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[25] Bessemer: Warren, F. B., Vice President. This witness, however, added that the actual cost was not much greater. (R) Tr. 32257, 32264.
Federal: Bates, J. E., Sales Manager (R) Tr. 30642-43.
Lone Star: Com. Ex. 976-13 Y.
National: Dannelly, Vice President (R) Tr. 39537.
Nebraska: Hoenig, Sales Manager (R) Tr. 41964-65.
North American: Porter, President (R) Tr. 33847.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38150. Also difficult to check customer's credit.
South Dakota State Cement Plant: Hartley, Sales Manager (R) Tr. 41535-36.

[26] McKee, Vice President, West Penn (R) Tr. 27795.

[27] Koch, Vice President, Lone Star (R) Tr. 32859.

[28] (R) Tr. 26467-68.

[29] (R) Tr. 28449-50.

[30] Lawrence: Ackerman, Sales Manager (C) Tr. 7273.
Lone Star: Koch, Vice President (R) Tr. 32858.

[31] Horner, President, Kosmos (R) Tr. 37020.
Manley, General Manager, Hawkeye (R) Tr. 41627.

curred by reason of thefts by such truckers.[32] The non-respondent South Dakota State Cement Plant which has continued to load customers' trucks will do so only when the driver brings a signed order from a responsible dealer.[33]

Hartley of the South Dakota plant testified that loading trucks was more expensive than loading cars. He said that at South Dakota, car loading was largely mechanical. For truck delivery it was necessary to take cement from the belt at the packing machine and convey it by hand to the truck loading platform approximately 100 feet away, drop it there, and later pick it up when a truck arrived to be loaded, all of which involved extra handling.[34] He said also that there was a variation in the size of truck loads. A small truck load contained only about 20 bags, but the same accounting procedure had to be followed as in the case of carloads. He said that South Dakota has always charged extra for loading trucks at the mill.[35]

Plants in some parts of the country are specially equipped for loading trucks. Thus, all of Huron's plants except the one at Duluth are equipped to load trucks primarily. They are what are called truck plants.[36] The Federal mill at Hamburg (Buffalo), N. Y. was built so that trucks could be loaded economically[37] but even so the company does not like that type of business. J. E. Bates, Sales Manager, put it this way:

> "Well, I would say it is a nuisance, to begin with. A customer might come running into your plant all out of breath and want two or three barrels

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[32] Ackerman, Sales Manager, Lawrence (C) Tr. 7273.

[33] Hartley, Sales Manager, South Dakota State Cement Plant (R) Tr. 41537.

[34] Id. Tr. 41535.

[35] Id. Tr. 41535-36.

[36] Townsend, General Manager, Huron (R) Tr. 33657.

[37] Bates, J. E., Sales Manager, Federal (R) Tr. 30630.

> of cement; he might want five or ten barrels of cement. Now, in our regular day's business we have probably a half a dozen truck orders that are scheduled to reach destination at a certain time, or to leave our plant at a certain time. This little customer comes in, buys f.o.b. your plant, he runs into your plant and wants to be waited on immediately. If you do not do it, he will come into our office, abuse our office people, and it does not stop there. The next time our salesman calls on him he tells that particular salesman what a swell company it is, he lost two or three hours' time, when it might be a half hour. You have to take those trucks in turn. I have yet to see a customer come into the plant for a small quantity that he did not think he was the only one in line, and he should be waited on immediately.
>
> I do not like it." (Tr. 30631-32)

An offer of proof was made on behalf of Peerless that it had installed a special pack house at its Detroit mill with special truck loading facilities.[38] The Universal Atlas mill at Buffington, Indiana, has adequate truck loading facilities.[39] Stone, Vice President, in answer to a general question and without reference to any particular mill, said:

> "Not when it began, and I don't know that you can say that we are well equipped; that is, perfectly equipped now, but I know that it cost us considerable money to do things around the plant to take care of such trucking as was done." (Tr. 35265)

D. Comparative Cost of Truck and Rail Delivery.

Any comparison of the cost of truck and rail delivery involves factors in addition to a comparison of truck and rail rates from mill to destination. Thus, with rail delivery the destination is a rail terminal or siding which

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[38] Russell, Vice President, Peerless (R) Tr. 34292-93.

[39] Varady (C) Tr. 12464-67.

may be at, near to or far from the customer's warehouse or job site and the cement may then have to be trucked a short or long distance from the rail terminal or siding to warehouse or job site. With truck delivery, the destination is the warehouse or job site. With rail delivery the minimum load is a carload, normally 132 barrels while with truck delivery the minimum may be 60 barrels, more or less. The factor of service is difficult to measure in dollars and cents. Any comparison of truck and rail rates will vary with the length of the haul and also with the extent of state control over truck rates. This last factor is different from state to state and also has developed more fully in some states than to others.

The evidence digested below relates chiefly to a comparison of rates and general expressions as to the advantages and disadvantages of the two methods of delivery.

Resp. Ex. 2511 shows the number of destinations from the following Universal Atlas shipping points from which the truck rate was lower, equal to or higher than the rail rates:

	Truck Rate Lower	Truck Rate Equal	Truck Rate Higher	
Buffington, Ind. mill	11	10	76	destinations
Muskegon warehouse	47	15	81	"
Milwaukee packing plan	140	24	33	"
Green Bay warehouse	82		13	"
Total	280	49	203	

The foregoing truck rates are rates in company controlled trucks and the majority of destinations are within a 40 mile radius of the shipping points though no exact distance was shown.[1]

Resp. Ex. 2390 is a tabulation prepared by Huron showing a comparison of truck rates paid by Huron to company controlled truckers throughout the period 1937 to Febru-

[1] Stone, Vice President, Universal Atlas (R) Tr. 35145, 35148.

ary, 1940 with (1) rail rates in effect June 30, 1937 and (2) increased rail rates in effect as of February 15, 1940. These comparisons are made from the following Huron shipping points: Detroit, Wyandotte, Alpena, Saginaw, Muskegon, Toledo, Milwaukee, Green Bay, Oswego and Buffalo. The truck rates shown are those on file with State Commissions as required by law with the exception of one which is on file with the I.C.C.

A study of this exhibit will show that truck rates are generally lower than rail rates for distances up to 30 or 40 miles from most of the shipping points and that after that truck rates increase much faster than do rail rates.

On cross-examination, Meyers, Huron, Traffic Manager testified that the truck rates shown in this exhibit were not secured by Huron after competitive bidding but that in some instances they were higher and in other instances lower than other trucking rates in Michigan.[2]

Townsend, General Manager, Huron testified that the outside mileage to which trucking is economical is around 40 miles as this exhibit shows and that the biggest saving comes inside 20 miles unless the area is within rail switching limits in which case the switching rate is less than truck rates.[3]

[Respondents offered in evidence Resp. Ex. 2411, being a tabulation of cement rail and trucking rates filed in Michigan for distances up to 250 miles from shipping point. This was excluded and respondents have moved to adduce it.[4] This tabulation was prepared by Peerless in the regular course of business in 1937 or 1938 in connection with a pending change of truck rates before the Michigan Public Utilities Commission.[5] It shows that for

[2] (R) Tr. 33515-17.

[3] (R) Tr. 33645-46, 33649.

[4] Motion For Leave To Adduce Additional Evidence, Subject VII, pars. 47-48.

[5] Russell, Vice President, Peerless (R) Tr. 34260, 34263-66.

distances up to 45 miles truck rates are lower than rail rates but for distances after that and up to 250 miles the rates are identical.]

Com. Ex. 2188 is a map prepared by the Iola Cement Mills Traffic Association for presentation to the I.C.C. in connection with a proposed rate increase in 1931 known as Ex Parte 103. This map covers states between Mississippi River and the Rocky Mountains. It states on the face of it that the map

> "* * * shows the Zones (100-mile radius) of the several cement-shipping points within which it now is feasible to TRUCK cement economically and at a delivered-on-job cost substantially lower than if shipped by railroad and trucked at destination from car to job or warehouse. The major portion of Western Trunk Line and Southwestern territories is within 100 miles of a cement-shipping point, and the most densely populated areas are within the 100-mile zones. Were the present rates on portland cement to be increased even 5 percent any such increase now, with the price of portland cement lower than at any time during the past 15 years, would reach powerfully in favor of shipping cement by truck and result in a substantial loss of tonnage and revenue to the railroads."

The evidence dealing with the activities of Cole, Traffic rates is set forth, *infra*, pp. 1568-90. Resp. Ex. 3255 B is Cole's proposal dated January 29, 1932 made to the railroads. It shows in 5 mile blocks up to 50 miles (1) rail rates under the 12710 Scale prior to January 4, 1932, (2) rail rates under the temporary emergency increase Ex Parte 103, (3) Cole's suggested rate to meet truck competition and (4) "average trucking rates." A comparison of columns (1) and (4) shows lower truck rates ranging from 4¢ in the 5 mile block to ½¢ in the 45 mile block and identical rates in the 50 mile block. Column (2) shows a temporary increase in rail rates of 10% throughout.

Resp. Exs. 3252, 3253, 3254, and 3258 are working sheets and other papers used in preparing the proposal.[6]

Four dealers testified on this subject. Campbell, President of the National Builders Supply Association, referring to his own experience as a dealer stated:

> "No trucker can pay his honest debts, his gasoline and keep up his trucks and make replacements and deliver cement to any job at any distance beyond two or three miles, as cheaply as the railroad can lay it down."[7]

Varady of the Varady Trucking Company at East Chicago, Indiana, testified that his company had trucked cement for dealers and contractors from the Universal Atlas Buffington mill.[8] On jobs located near the railroad he met the railroad freight rate, but where the cement was delivered to the job he was paid 5¢ extra by the consumer. He never charged less than the full railroad freight rate.[9] Outside of the forty or forty-five mile Chicago metropolitan area it wasn't profitable to meet the railroad freight rate.[10]

Miller, a Boston dealer, testified that approximately fifty miles was the greatest distance trucked inland from Boston by his company.[11]

Callaghan, a manufacturer of ready mixed concrete in Harrison, N. J., testified that he incorporated a company

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[6] Cole, Traffic Manager, Medusa (R) Tr. 40903-04, 40922.

[7] Campbell (C) Tr. 4577.

[8] Varady (C) Tr. 12458.

[9] Id. Tr. 12476-77, 12482.

[10] Id. Tr. 12497.

[11] Miller, W. T., Dealer, Jenney & Lux (C) Tr. 7467.

to truck from mills to his plant, a distance of from 60 to 75 miles, and trucked at 50% less cost than rail.[12]

In the Buffalo & Oswego areas Coogan, Vice President, Alpha, testified that Alpha trucks a distance of 75 miles from its Jamesville, N. Y. mill to Oswego to meet Huron truck competition and that this "costs us much more * * * than it does by rail". He added that for distances of 100 to 125 miles from this mill where the truck rate is about 65¢, the rail rate is 49¢ or 51¢.[13] J. E. Bates, Sales Manager, Federal, testified that it costs considerably more to truck cement from Federal's Buffalo mill to Oswego than to ship by rail and that 40 miles is the maximum radius that trucks can cover economically.[14]

Penn-Dixie's testimony on this subject was stricken and respondents have moved to adduce it (Motion For Leave To Adduce Additional Evidence Subject VII, pars. 47-48). The testimony was that truck rates in 1937 from its Portland Point, N. Y. mill into Oswego, Wayne, Jefferson, Lewis and northern Cayuga Counties, N. Y. are considerably higher than rail rates except for a few short hauls. Penn-Dixie confines trucking to those counties because it finds truck competition only in those counties. The truck rates are those filed with the N. Y. State Public Service Commission as required by law.][15]

Excerpts from letters and other documents making general statements on this subject are as follows:

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[12] (C) Tr. 7622, 7624, 7654-55.

[13] (R) Tr. 23686-87.

[14] (R) Tr. 30629-30, 30634.

[15] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38152-54 Stricken Tr. 38217-18.

A Universal Atlas inter-office memorandum dated December 10, 1929 from Hallock, Assistant Sales Manager, to Hoy, Sales Manager, reads in part as follows:

> "For many years all of our shipments were made by rail, and trucking was first given a trial during the car shortages a few years ago, particularly at the time when the railroads were under Government control. In this way many customers learned that it was more economical to truck cement from mills to nearby points of use than to ship by rail and haul cement from destination to sites of work." (Com. Ex. 2647 A)

Another Universal Atlas inter-office memorandum dated January 7, 1931 from Craig, District Sales Manager, to Quebbeman, Sales Manager dealing with trucking in Indiana and Michigan, reads in part as follows:

> "Under present prevailing prices truck deliveries from competitive mills, tank or warehouse (with exception of certain mills so situated that no appreciable tonnage is involved) can not be competed with by us with car shipments. With mill prices f.o.b. trucks at majority of mills located outside of Detroit the same as the f.o.b. car destination prices less freight rate all jobs that come within an economical trucking radius of those mills, which in Michigan this year has been up to 70 miles, truck delivery has been made direct to job site at our f.o.b. car price at considerable savings to contractors.
>
> Dealers find it economical to truck their warehouse requirements. It is possible for them to keep stocks low, get quick service, and requires a small initial investment. Practically all cement companies make trucking arrangements for the dealer and cement is unloaded directly into warehouse by the trucker. Our car shipments can not compete." (Com. Ex. 2653 C)

(This memorandum is quoted more fully *infra*, pp. 1514-15, and shortly after this Universal Atlas dropped its 15¢ differential at its Buffington, Ind. mill.)

An unaddressed, unsigned and undated memorandum taken from the files of Diamond and identified as a document prepared by Raff (Diamond) and commenting on a memorandum by Davis (Standard) on trucking and sent by Raff to Davis and other competitors,[16] reads in part as follows:

> "Truck transportation represents so many advantages on the short haul that it is inconceivable that any mill which is favorably located with regard to its market would consider its complete abandonment.
>
> (Contractors and consumers) It is hardly necessary to state the position of the contractor. Trucking of materials represents to him definite savings of time and money. The convenience and flexibility of this method of delivery are valuable to him. It has been our experience that a contractor who has once purchased cement delivered by truck from any company experienced in truck shipments will always in the future prefer truck to rail shipment at equal figures." (Com. Ex. 2660 A-B)

[A letter dated June 20, 1935 Raff (Diamond) to Dr. Arthur R. Burns reads in part as follows:

> "The trucking policy as outlined above will clearly show that the buyer did enjoy an advantage both on cost delivered to the job and in service, and this service is no small consideration, altho difficult to determine accurately in dollars and cents.
>
> • • •
>
> We are of the opinion, based on large experience, that delivery of cement by properly regulated motor trucks has an economic place in the picture. The benefits accruing to the dealer, contractor, and tax payer must be self evident to any one with any experience with the question if the selfish interests of all concerned could be eliminated." (Com. Ex. 971-13 K)]

[16] MacIntyre, Attorney, F.T.C. (C) Tr. 14567-68.

[A letter dated June 11, 1935 from Letzkus, Sales Manager, Pittsburgh to Dr. Arthur R. Burns reads in part as follows:

> "Trucking from a cement plant is not a disadvantage to that particular plant because it permits buyers to go right to the plant for their cement, get less than a carload at a time, secure deliveries as they want it, tie up less money at one time in cement, and in that particular area around the plant unquestionably gives the cement plant a very decided advantage over the rail shippers." (Com. Ex. 971-12 G)]

A memorandum dated April 20, 1933 from Lehigh's Pittsburgh office to salesmen reads in part as follows:

> "As you know the trucking situation in the State of Ohio the past two years covered practically the whole state and many of the dealers refused to buy carload shipments but would send their trucks to these plants because of the saving it afforded." (Com. Ex. 2774)

[A letter dated June 16, 1933 from Neylan, Assistant Sales Manager, Lone Star, to Cree, Sales Manager, Aetna reads in part as follows:

> "It is, in our opinion, absolutely impossible to approach a point of equality of service by utilizing two means of transportation diametrically opposite to each other from the point of service performed. The truck delivered price possesses an advantage which cannot readily be overcome by a carload shipper and there is no means available, or at least it has not yet been found, to make the two services comparable. Equality as it relates to our business consists of equality of final cost to the purchaser at the final delivery point. Delivery by truck injects an element of uncertainty as to final cost, and your competition is forced to estimate or guess what it must do to equal the service performed by the truck shipper. This uncertainty is the root of all evil, and it can never be corrected until the truck

'is subject to some measure of control, either by the various States or by the Federal Government.'' (Com. Ex. 422 C-D)

See also a Lone Star inter-office memorandum dated May 8, 1933, Com. Ex. 422 I-K.]

Testimony on this subject is as follows:

Reiter, Chairman Cement Code Authority, was asked if truck rates were generally lower than rail rates for distances up to 100 miles. He answered:

> "Mr. Wooden, I believe it is impossible to make an all-inclusive answer to that question, without having any truck rates in mind even on short hauls. Truck rates compared to switching rates from the mill might well be higher, but where there is an advantage in truck rates as against rail rates, it is in the shorter hauls. Moreover, I would like to say that in my mind, a hundred miles is a long haul for a truck, and I would be surprised if any truck haul of a hundred miles would be equal to a rail rate for that distance.'' (Tr. 3432-33)

Twamley, Vice President, Coplay testified as follows:

> "Q. Was not the transportation of cement by truck from the mill the cheaper mode of transportation than by rail? A. It may have been to some localities, and it may have been more expensive. I could not answer that.
>
> Q. In the nearby short hauls, it was cheaper, wasn't it? A. I think it probably was, yes, sir.'' (Tr. 6802)

Meyer, Vice President, Green Bag, Pa. testified at an I.C.C. rate hearing November 5, 1937 in part as follows:

> "Undoubtedly when you look at the situation, the trucking, look right at it, the difference between

trucking and rail is this, that when you truck cement you usually take it right out on the job. When you rail it, you take it there, and then transfer it out of the car and move it to the job and while the trucking to the job may be more than the rail rate, the trucking to the job will not be more than the rail rate plus the trucking from the car to the job, you will find it is always less." (Com. Ex. 1319, p. 116)

F. B. Warren, Vice President, Bessemer, referring to shipments by contract trucker from their Bessemer, Pa. mill into the Cleveland area, testified that there was no saving in shipping by truck as against rail[17] and said:

"The rates that we paid the trucking contractor have varied from even with rail rates to considerably above rail rates. In no case have they been below.

The size of a sale in truck lots is approximately half the size of a sale in carlots. We have the extra handling of those orders, the billing, and the very big item of solicitation, extra on trucks as compared to car lots." (Tr. 32257)

Cole, Traffic Manager, Medusa, testified that Medusa's truck rate from its Baybridge, Ohio mill to Cleveland was about 9¢ a barrel higher than the rail rate.[18]

[Testimony of the witness Cole as to the trucking costs of Medusa was excluded and respondents made an offer of proof and have moved to adduce this evidence.][19]

Cole testified that trucking rates in Michigan are required to be filed with the Public Service Commission of Michigan and this filing has been required since 1932.

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[17] (R) Tr. 32254-55.

[18] (R) Tr. 41441-42.

[19] (R) Tr. 41022-23, 41028-30; Motion for Leave to Adduce Additional Evidence, Subject VII, pars. 47-48.

Truck rates so filed "meet the rail rates to points of destination in Michigan on the same level".[20] In Wisconsin filing is also required and truck rates are higher than rail rates.[21]

W. R. Blair, Sales Manager of Southwestern's El Paso, Texas mill, testified that published truck rates from El Paso to certain sections of Arizona are the same as rail rates and that he had not seen any rates that were lower than rail rates.[22]

[After evidence was rejected as to the improvement of plant facilities at the El Paso mill for the loading of trucks respondents offered to prove through the witness Blair that:

> "• • • the Southwestern Company made a survey of their mill with reference to the problem of installing adequate facilities for loading trucks, and they found that it would cost in excess of sixty or seventy thousand dollars to erect a new pack house and loading platform; and I further offer to show through this witness that the volume of truck business at their mill is not large enough to support such an investment." (Tr. 38912)

Respondents have moved to adduce this evidence.][23]

E. Price Policies: General.

The record shows that in making sales to customers' trucks at the mill, a great variety of price policies have been employed at different times by different companies and in different parts of the country. The 15¢ trucking differential is a price policy but it is dealt with separately

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[20] Cole, Traffic Manager, Medusa (R) Tr. 41044-45.

[21] Id. Tr. 41045-46; Resp. Exs. 3299, 3300.

[22] (R) Tr. 39344.

[23] Motion for leave to adduce additional evidence, Subject VII, pars. 47-48.

under F., pp. 1485-1524, *infra* because of the large amount of evidence on that particular policy. Apart from this differential, the policies most generally found in the industry are the following:

1. f.o.b. mill at base or mill price.
2. delivered price: base plus rail freight with rail freight allowed. This is a form of f.o.b. mill price.
3. delivered price: base plus truck charge to destination.
4. delivered price: base plus rail freight to destination less trucking allowance. This is a form of f.o.b. mill price.
5. delivered price: base plus rail freight.
6. miscellaneous special truck prices.

The evidence is presented below to show the policies followed by individual mills in the different Bureau of Mines Districts. Apart from markets on the Great Lakes, the policies of individual mills, in so far as they are shown in the record, are detailed in tables *infra*, pp. 1474 to 1484. The markets on the Great Lakes are treated differently and the evidence is digested *infra*, pp. 1453 to 1474 because the great variety of policies in different markets does not lend itself to tabular arrangement.

If there is no evidence as to a particular company or mill, it is omitted and thus the lists of companies and mills in the tables *infra*, pp. 1474 to 1484 list only companies and mills as to which there is any evidence in the record. If the only evidence as to a particular mill is that it sold f.o.b. mill at base price plus a 15¢ differential, during the period of time when the mill made that charge, that mill is listed as selling f.o.b. mill at base price as plainly a mill must sell f.o.b. mill if it is to add 15¢ or any other charge to a base or mill price.

District No. 1. Of the 24 mills listed in the table *infra*, pp. 1475-76, 15 sold f.o.b. mill at the base price (including

the 6 Lehigh mills), 8 (again including the 6 Lehigh mills) sold at a rail delivered price less rail freight, 3 sold at a delivered price of base plus lowest trucking charge to destination while the four other mills had variations of these:

District No. 2. Of the 11 mills, 2 packing plants and one warehouse listed in the table *infra*, pp. 1476-77, 9 sell or have at one time sold f.o.b. mill at a plant or base price, 2 sold at rail delivered price less rail freight and the five mills, packing plants and warehouses around Buffalo and Oswego have had a variety of policies at different times.

District No. 3. (Except Points on Great Lakes—Toledo, Cleveland, and other points in northern Ohio). Of the 8 mills and 4 warehouses listed in the table *infra*, pp. 1478-79, 3 of the mills sold at a mill price which was a base price or a flat mill price and two sold at a rail delivered price less rail freight.

The 4 warehouses in Pittsburgh were established in 1930 and 1931 to meet the competition of the Green Bag, Pa. mill located on Neville Island in Pittsburgh which was delivering to trucks at this mill. Sales were made at these warehouses to meet this competition. One of the other mills delivered into Pittsburgh in hired trucks and the other 2 mills had different policies.

District 4 and Points on the Great Lakes. Evidence as to this area is digested *infra*, pp. 1453 to 1474.

District No. 5. (Except Points on the Great Lakes—Chicago, Milwaukee, and Manitowoc). Of the 6 mills listed in the table *infra*, p. 1480, each mill has a different price policy.

District No. 6. Of the 12 mills listed in the table *infra*, pp. 1480-82, 8 sold at rail delivered price less rail freight and each of the other 4 mills had different policies.

District No. 7. Of the 8 mills and one packing plant listed in the table *infra*, p. 1482, 3 sold at a rail delivered price less rail freight, 3 sold at an f.o.b. mill base price,

the Huron packing plant sold at a special truck price, and the other two sold at policies that were variations of these.

District No. 8. Of the 9 mills listed in the table *infra*, pp. 1482-83, 5 sold at a rail delivered price less rail freight, 3 sold at an f.o.b. mill base price and the other sold at what appears to be a special truck price at the mill.

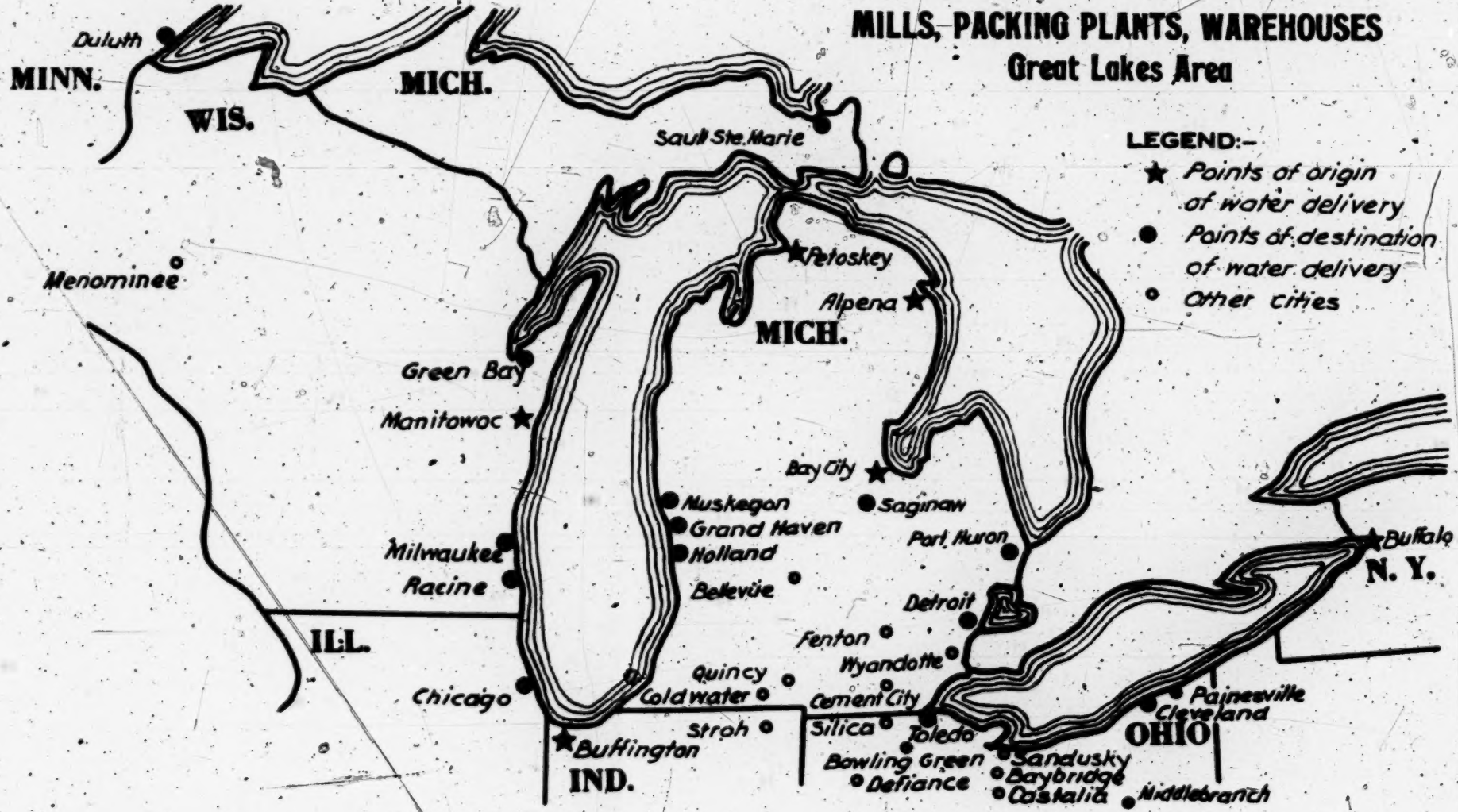
District No. 9. Of the 6 mills listed in the table *infra*, pp. 1483-84, 4 used f.o.b. mill prices with variations, one used a rail delivered price less rail freight with a varying surcharge since January 1936, except on sales to Arizona and New Mexico points and the other used rail delivered price less rail freight.

District No. 10. Of the 6 mills listed in the table *infra*, p. 1484, 4 use a rail delivered price less rail freight and the other 2 make an f.o.b. mill price.

1. District 4 and Points on the Great Lakes

District 4 covers the lower and upper peninsulas of Michigan. Because of the important influence of water transportation on the Great Lakes and sales from packing plants, silos and warehouses located at points reached by water, there have been included under this heading points on Lake Erie (Toledo, Cleveland and other points in northern Ohio) and points on Lake Michigan (Chicago, Illinois, Milwaukee, Manitowoc and Green Bay, Wisconsin) as well as all points in Michigan on the lakes and otherwise. Duluth, on Lake Michigan, and Buffalo and Oswego on Lake Erie and Lake Ontario are included in Districts 7 and 2 respectively. Because of the variety of policies that have prevailed at different times and places in this area, the subject is treated by markets rather than by companies.

For convenience the points at which mills, packing plants, silos and warehouses are located in this area, together with the points of origin and destination of water shipments, are shown on the accompanying map.


MILLS, PACKING PLANTS, WAREHOUSES
Great Lakes Area
LEGEND:-
Points of origin of water delivery
Points of destination of water delivery
Other cities
Duluth
MINN.
WIS.
MICH.
Sault Ste. Marie
Petoskey
Alpena
MICH.
Menominee
Green Bay
Manitowoc
Bay City
Muskegon
Saginaw
Grand Haven
Holland
Port Huron
Buffalo
N. Y.
Milwaukee
Racine
Bellevue
Detroit
ILL.
Fenton
Wyandotte
Quincy
Coldwater
Cement City
Chicago
Stroh
Silica
Toledo
Painesville
Cleveland
OHIO
Buffington
IND.
Bowling Green
Sandusky
Defiance
Baybridge
Castalia
Middlebranch

The legend on the map shows points of origin of water delivery and points of destination of water delivery as well as other cities. The legend and the lists below show the mills, warehouses and packing plants at all of the points shown on the map.

LEGEND FOR LIST BELOW:

× mill
○ warehouse
△ packing plant

INDIANA

BUFFINGTON
× Universal Atlas

STROH
× Wabash

ILLINOIS

CHICAGO
○ Universal Atlas
△ Petoskey
○ Lehigh
○ Medusa

WISCONSIN

MILWAUKEE
△ Huron
△ Medusa
△ Petoskey
○ Lehigh
○ Alpha
○ Universal Atlas

RACINE
○ Aetna

MANITOWOC
× Medusa

WIS. (*Continued*)

GREEN BAY
○ Aetna
○ Universal Atlas
○ Alpha

MENOMINEE
○ Aetna
○ Universal Atlas

MICHIGAN

PETOSKEY
× Petoskey

SAULT STE. MARIE
○ Aetna

MUSKEGON
△ Huron
○ Universal Atlas

GRAND HAVEN
○ Aetna

HOLLAND
○ Medusa

ALPENA
× Huron

BAY CITY
× Aetna

MICH. (*Continued*)

SAGINAW
△ Huron
○ Aetna

BELLEVUE
○ Alpha

PORT HURON
○ Aetna
× Peerless

DETROIT
× Peerless
△ Huron
○ Aetna
△ Petoskey

WYANDOTTE
× Huron

FENTON
× Aetna

CEMENT CITY
× Consolidated

QUINCY
× Wolverine

COLDWATER
× Wolverine

OHIO

DEFIANCE
○ Pittsburgh

TOLEDO
△ Huron
○ Aetna

OHIO (*Continued*)

SILICA, TOLEDO
× Medusa

BOWLING GREEN
○ Pittsburgh

BAYBRIDGE, SANDUSKY
× Medusa

CASTALIA NEAR SANDUSKY
× Castalia

CLEVELAND
△ Huron
○ Aetna
○ Universal Atlas
○ Alpha
△ Great Lakes, Lehigh
○ Medusa

MIDDLEBRANCH NEAR CANTON
× Diamond

PAINESVILLE
× Standard

NEW YORK

BUFFALO
× Great Lakes, Lehigh

MINNESOTA

DULUTH
△ Huron, Lehigh
× Universal Atlas

Huron has always been an important factor in this area. It has its mill at Alpena, Michigan from which cement is carried in bulk in its own boats to packing plants at Detroit, Cleveland, Toledo, Milwaukee, Saginaw and Muskegon.

Huron's price policies for delivery to trucks at its packing plants have varied in detail from plant to plant and from time to time but in general in the period from 1926 to May 25, 1931 "the shipment was invoiced at carload price, f.o.b. the plant, and outside of the switching district a customer was allowed the rail rate for trucking, and inside the switching district, at Detroit particularly, I think it was 10 cents a barrel."[1]

On May 25, 1931 Huron made a plant price for delivery to customers' trucks at Milwaukee, Toledo, Cleveland and Detroit in this area.[2] Resp. Ex. 2381 A-B is the quotation form used at this time and it contains a quotation either "f.o.b. cars your station in carload lots" or "f.o.b. trucking platform, our nearest plant." If delivery was taken in cars the price would be different to different destinations but the plant price to trucks remained stationary. This optional method continued until March 10, 1933.[3]

On March 10, 1933 Huron dropped the plant prices and announced to the trade that it was going to sell at a delivered price and deliver in company controlled trucks.[4] This meant that if a customer came to the plant he was charged the same price as if the cement was delivered to him at his destination by rail or in company trucks.[5]

The following are the principal markets in this area in each of which there was active trucking:

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[1] Meyers, Traffic Manager, Huron (R) Tr. 33309-10.

[2] Id. Tr. 33310.

[3] Id. Tr. 33313-16.
Rooney, Vice President, Huron (R) Tr. 33690.

[4] Meyers, *supra*, Tr. 33345-46.
Rooney, *supra*, Tr. 33690-91.
Com. Ex. 4220: Huron announcement to customers dated March 10, 1933.

[5] Meyers, *supra*, Tr. 33513-14.

CHICAGO, ILLINOIS:

The closest mill to Chicago is the Universal Atlas mill at Buffington, Indiana. Delivery of cement to customers' trucks at this mill began in the early 1920's as the result of a serious shortage in railroad cars and a switchmen's strike. This trucking is now carried on into parts of Illinois but none is taken by Indiana customers because they do not want it. The price (except during the period of the 15¢ differential) is the Buffington base price. Trucking in company controlled trucks began June 4, 1934 and is only to certain counties in southwestern Michigan to which it is cheaper to truck from Buffington than from its Muskegon, Michigan warehouse.[6]

Universal Atlas has had a warehouse in Chicago for many, many years and there it loads customers' trucks at 5¢ a barrel above the Chicago rail price.[7]

The Manitowoc Company (later bought by Medusa) built a silo and packing plant in Chicago in 1926 to which bulk cement is taken by water from the Manitowoc, Wisconsin mill in order to be able to make delivery by truck to compete with Universal Atlas. Dealers are sold at the silo and, if demanded, cement is also distributed in freight cars within switching limits of Chicago and in Cook County.[8] The Chicago silo price is a Chicago delivered price.[9]

Petoskey opened its Chicago silo April 26, 1929 to which it delivers by boat from its Petoskey, Michigan mill. Most cement sold at the silo is sold to dealers' trucks.[10] Petoskey sells at both a delivered price and also has a flat f.o.b. price

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[6] Stone, Vice President, Universal Atlas (R) Tr. 35178-83. Resp. Ex. 2518: Universal Atlas announcement, dated June 4, 1934.

[7] Stone, *supra*, Tr. 35173-74.

[8] Dawson, Vice President, Medusa (R) Tr. 40034-35.

[9] Dawson, *supra*, Tr. 40501.

[10] Lucas, Vice President, Petoskey (R) Tr. 38688, 38737, 38788.

at the silo for those who come to the silo and take delivery there.[11]

Lehigh was the last company to establish a warehouse in Chicago. It established it late in 1929 to meet the truck competition from competitive silos and warehouses but gave it up early in 1932 because it was a costly means of distribution and Lehigh found that the price level was such that it was able to get a reasonable amount of business at carload quotations. Most competitors continued their warehouses.[12]

MILWAUKEE, WISCONSIN:

When Huron built its packing plant at Milwaukee in 1923 it was the only company coming in there by water. The rest came by rail.[13] Competitors built silos and warehouses: Medusa, Petoskey, Universal Atlas, Lehigh and Alpha.[14] Medusa built its silo and packing plant in 1926 and came into Milwaukee by water from its Manitowoc mill and Petoskey built its silo in 1929 and came in by water from its Petoskey, Michigan mill.[15] Universal Atlas spent in the neighborhood of $200,000 to build its silo the latter part of 1930[16] and Lehigh opened its warehouse there early in 1931.[17] Alpha also opened a warehouse there.[18]

Huron first sold at its Milwaukee packing plant at an f.o.b. plant price made by deducting freight from a

[11] Lucas, Vice President, Petoskey (R) Tr. 38700, 38722, 38822-23, 38838.

[12] Bowen, Vice President, Lehigh (R) Tr. 26886-88.

[13] Crapo, Vice President, Huron (C) Tr. 11280.

[14] Id. Tr. 11086.

[15] Dawson, Vice President, Medusa (R) Tr. 40033.
Lucas, *supra*, Tr. 38688, 38737, 38788.

[16] Stone, Vice President, Universal Atlas (R) Tr. 35136, 35158.

[17] Bowen, *supra*, Tr. 26888.

[18] Coogan, Vice President, Alpha (R) Tr. 23651.

delivered price. On May 25, 1931 a straight f.o.b. plant price was quoted delivered to trucks at Huron's trucking platform. This continued until August 6, 1932 when Huron quoted a delivered price by truck in company controlled trucks within a radius of 30 miles which was extended to 50 miles on August 8th. This area was extended during the NRA Code and the extended area is still in effect.[19]

When Medusa came into Milwaukee it sold on the same basis as it had before *i.e.*, the lowest price quoted by any competitor. It never initiated a plant price but met the competition of Huron's plant price of May 25, 1931 and until March, 1932 quoted f.o.b. silo prices for delivery to customer's trucks. The present policy is if a dealer orders delivery to his warehouse by contract carrier, Medusa prepays transportation charges while if a dealer desires to pick up cement at the silo, Medusa charges the delivered price at the dealer's warehouse.[20]

When Petoskey opened its silo on May 1, 1929 it sold at an f.o.b. silo price and most of its cement sold there is trucked.[21] Universal Atlas now moves substantially all the cement that goes by truck in its own trucks at delivered prices. There is a negligible movement in customers' trucks. The Milwaukee plant was built to maintain Universal Atlas' position in that market in the face of dwindling rail shipments due to truck competition.[22] From December 12, 1930 to May 27, 1931 Universal Atlas quoted f.o.b. warehouse prices that varied according to two zones within Milwaukee County and outside the county it quoted rail delivered price less rail freight. On May 27, 1931 when Huron quoted what was a base price, Universal Atlas

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[19] Meyers, Traffic Manager, Huron (R) Tr. 33442-44.

[20] Dawson, Vice President, Medusa (R) Tr. 40033-34.
Resp. Ex. 3142: Medusa interoffice memo, Krogy to Schwaab, dated 12/1/31.

[21] Lucas, Vice President, Petoskey (R) Tr. 38688, 38788.

[22] Stone, Vice President, Universal Atlas (R) Tr. 35157-58.

met it and quoted a plant price.[23] In March, 1935 when a competitor (during NRA) filed with the Code Authority a more favorable policy Universal Atlas met that and it is substantially its present policy. This is a delivered price in company controlled trucks to all points in eleven named counties in Wisconsin and if the customer desires to pick it up at the plant in his own truck he is charged the same price.[24]

Lehigh, which had established its silo early in 1931 to meet trucking competition and to save its rapidly dwindling business there, abandoned it in May, 1932 to relieve itself of the burden of cost and because it found that prices quoted by competitors enabled it to get some business by carload shipments from its Oglesby, Illinois mill. At the present time Lehigh does not ship into this market at all. The establishment of a base there and an unattractive market price drove them out of the market.[25]

AETNA WAREHOUSES:

Aetna completed its Bay City, Michigan, mill on Lake Huron in about 1927[26] and between 1930 and 1933 it established warehouses at a number of points in this area to which packaged cement was taken in its boat from Bay City. Warehouses were established at Detroit, Cleveland, Toledo, Port Huron, Bay City, Grand Haven, Menominee, Green Bay, Racine and Sault Ste. Marie in about the order named.[27] Aetna was the first in the area to de-

[23] Com. Ex. 3141 J: Universal Atlas tabulation of net prices f.o.b. trucks dated 3/26/33.

[24] Stone, Vice President, Universal Atlas (R) Tr. 35159-62. Resp. Ex. 2515: Letter dated 3/19/35, Universal Atlas to Reiter, Chairman, Code Authority.

[25] Bowen, Vice President, Lehigh (R) Tr. 26888-91.

[26] Cree, Sales Manager, Aetna (C) Tr. 506.

[27] Id. Tr. 510-12.
Com. Ex. 17: Map of Michigan.

velop this method of distributing packaged cement by boat to warehouses and selling to the trade for truck delivery. Others deliver in bulk and have to build silos for packaging.[28] The general pricing methods employed were described by Cree, former Vice President, as follows:

> "Well, our policy was to take care of our particular trade, or family, as we developed it, in the best way that we could with respect to our own cost, in competition. The prices varied.
>
> Q. Did you quote your trade, commercial trade, on a delivered price basis? A. Most of the time. At one time we were giving a so-called trucking allowance, but I believe that was eliminated. I know it was eliminated. The trucking allowances there, when they came to the mill or warehouse to get the cement is what I mean.
>
> Q. When you quoted on the delivered price basis did you use any basing points that were in effect at other mills? A. Only to the extent that it would better help me get a general analysis of the particular situation. I was interested at that time in just finding out what competition was doing and what I would have to do to command that particular business." (Tr. 513)

Further:

> "Q. Was it your aim and policy then to, in general, meet the delivered prices of other mills but not go below them in sales to dealers? A. Well, to the dealer trade I might say that that was prevalent, that we sort of followed the trend of the market, when it fluctuated a little bit, but we always were independent, because that was my job, and I did it. I did not care whether it was Universal or Lehigh, or Huron, it did not make any difference what some other company was quoting. I used my own head and judgment as to what prices we would quote.
>
> Q. Sometimes you were below the other and sometimes the same? A. Sometimes, yes, and then I had the economic advantage too, which I thought I was

[28] Cree, Sales Manager, Aetna (C) Tr. 516.

entitled to, to make better deliveries in the territories on account of water transportation and trucking delivery, and I could give service." (Tr. 514)

Aetna considered Huron as its leading competitor in Michigan.[29]

When Calvin became Vice President of Aetna in August, 1936, he determined to close these warehouses "because they were unprofitable, and the cement could be distributed in those markets direct by truck, much more cheaply than it could be taken there by boat and put in the warehouse"[30] and also "when we put cement through that warehouse it had, naturally had to go in in big quantities, and would get warehouse set, get wet, some of the sacks would be broken and re-sacked, and when the workmen re-sacked the cement they were careless and got foreign matter into the sack, like old cigarette stubs, and once in a while a tobacco can, or something like that, and the customers complained, and when we trucked direct from the plant we had no such complaints because the cement was always fresh."[31]

The warehouses were all closed between the Fall of 1936 and April, 1938.[32] There was no agreement with, or pressure or suggestion from competitors in connection with the closing of these warehouses.[33]

At about this time Aetna started delivering in company controlled trucks and now about 75% of Aetna cement is delivered in this way either to a dealer's warehouse or to a job site—anywhere it is wanted. Aetna trucks all over Michigan, some around Toledo, northwestern Ohio and

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[29] Crec, Sales Manager, Aetna (C) Tr. 516.

[30] Calvin, President, Aetna (R) Tr. 29959. Details as to the financial losses of Aetna in the operation of these warehouses are shown in the testimony of Calvin, President (R) Tr. 29959-90.

[31] Id. Tr. 29960.

[32] Id. Tr. 29979-80.

[33] Id. Tr. 30009-10.

eastern Wisconsin. Aetna allows dealers to come to the mill with trucks "but we do not like the proposition. It is a lot of trouble." The truckers are contract truckers and with the exception of a small zone around the mill Aetna pays them a figure that is identical with the rail freight rate to the destination. Aetna attempted to get lower truck rates but "they have been trying to raise the rates on all us all the time".[34]

GREEN BAY, WISCONSIN:

In addition to the Aetna warehouse, both Universal Atlas and Alpha established warehouses there. Universal Atlas put in its warehouse in about 1932 after competitors had begun trucking from Green Bay. Universal Atlas sells on substantially the same basis as it does from its Milwaukee warehouse, *supra*.[35] Alpha sells to dealers' trucks or delivers in hired trucks.[36]

PETOSKEY, MICHIGAN:

Petoskey has its mill here and at all times has sold to customers' trucks at the mill at an f.o.b. mill price without regard to where they want to take the cement.[37] On June 9, 1934 Petoskey offered to deliver in company controlled trucks within a reasonable trucking radius. The price was a delivered price based on rail except to points where there was no rail service and points where there were zone prices.[38]

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[34] Calvin, President, Aetna (R) Tr. 30128, 30137, 30189-90.

[35] Stone, Vice President, Universal Atlas (R) Tr. 35165-66, 35170-71.

[36] Coogan, Vice President, Alpha (R) Tr. 23651, 23727.

[37] Lucas, Vice President, Petoskey (R) Tr. 38822-23, 38722, 38728.

[38] Id. Tr. 38721-22, 38819-21.

MUSKEGON, MICHIGAN AND NEARBY POINTS:

Huron has a packing plant and Universal Atlas a warehouse at Muskegon, Michigan. Aetna had a warehouse at nearby Grand Haven and Medusa has one at Holland. Universal Atlas' warehouse was built at a cost of about $95,000 to meet competitive trucking and trucking is permitted on substantially the same basis as from its Green Bay and Milwaukee warehouses.[39]

When Medusa decided to abandon its nearby Newaygo mill it established a warehouse at Holland in 1933 and transported cement across Lake Michigan in a small boat from its Manitowoc plant. This enabled Medusa to compete with producers who shipped by rail to Grand Rapids. In 1937 the warehouse was abandoned due to low prices and in 1939 Medusa started building a silo and packing plant at Holland to which cement is delivered in bulk by water from Manitowoc.[40]

ALPENA, BAY CITY, SAGINAW, PORT HURON:

Huron has its main mill at Alpena and a packing plant at Saginaw. The latter was built in 1932 after the Aetna Bay City plant was built and Aetna was trucking heavily. Huron shipped its first cement from Saginaw March 17, 1933 and offered the option of truck or rail deliveries to customers from the start.[41] Huron was then equipped to ship by truck.[42] At the present time Huron quotes a delivered price and delivers in company controlled trucks. If a customer comes to the mill in his own truck he is also

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[39] Stone, Vice President, Universal Atlas (R) Tr. 35135-36, 35174-75.

[40] Dawson, Vice President, Medusa (R) Tr. 40038-39.

[41] Crapo, Vice President, Huron (C) Tr. 11282-83.

[42] Meyers, Traffic Manager, Huron (R) Tr. 33397-98.

charged a delivered price.[43] At Alpena, Huron sold at a plant price until March 10, 1933 when Huron sold at either a delivered price in hired trucks or to the customer's truck at the plant.[44]

At Aetna's Bay City mill prior to the last few years (before 1934) the buyer was allowed the freight or trucking rate for pickup at the mill but since then he has been sold at a delivered price.[45]

At Port Huron, Aetna had a warehouse and Peerless has a mill. Peerless sold at its mill, as follows:

a. August, 1925 to October 1, 1931:
rail delivered price less allowance for trucking equal to lowest rate Peerless could obtain from trucking companies on competitive bids.

b. October 1, 1931 to March 7, 1933:
rail delivered price less rail freight rate to destination.

c. November, 1933 to date:
rail delivered price with no allowance.

During all of the above periods whether Peerless delivered in company controlled trucks or by rail the price was a rail delivered price. The improved service in company controlled trucks and the small minimum load of 60 barrels has been so advantageous to dealers that very little trucking is now done by dealers except in small lots for points close to the plant.[46]

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[43] Crapo, Vice President, Huron (C) Tr. 11447.

[44] Meyers, Traffic Manager, Huron (R) Tr. 33504, 33509.

[45] Com. Ex. 967-5 B: Aetna answer to Burns-Clark questionnaire.

[46] Com. Ex. 970-6 G, 971-12 C-E: Peerless answer to Burns-Clark questionnaire.

DETROIT, MICHIGAN:

In this market Peerless has a mill, Huron has a packing plant and a mill at nearby Wyandotte, Petoskey has a silo and Aetna had a warehouse.

Huron has always trucked from its Detroit silo.[47] Prior to May 25, 1931 Huron had a plant price for trucks under which the shipment was invoiced at carload price, f.o.b. the plant and inside the Detroit switching district the customer was allowed 10¢ a barrel and outside it he was allowed the rail rate. On May 25, 1931 Huron quoted a straight plant price "f.o.b. trucking platform, our nearest plant". During this period there was no restriction as to where the cement was to be carried by the customer. This continued until March 10, 1933 at which time Huron quoted delivered prices and announced that it would deliver in company controlled trucks. If a customer came to the plant he was charged the same price as if the cement was delivered at his destination in company controlled trucks or by rail.[48]

Peerless sold to trucks at its Detroit mill with some variation of the foregoing. Up to October 1, 1931 it sold at a Detroit delivered price less 10¢ and from that date to March 7, 1933 it sold on the same basis less 15¢. After November, 1933 it made no allowance for delivery to trucks at the mill. If the customer called for delivery by rail or company controlled trucks he was quoted at the rail delivered price.[49] Peerless now ships by contract truckers.[50]

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[47] Crapo, Vice President, Huron (C) Tr. 11076.

[48] Meyers, Traffic Manager, Huron (R) Tr. 33309-16, 33345-46, 33502-03.
Rooney, Vice President, Huron (R) Tr. 33690.

[49] Com. Exs. 970-6 U, 971-12 C-E: Peerless answer to Burns-Clark questionnaire.

[50] Russell, Vice President, Peerless (R) Tr. 34255.

Petoskey ships cement by boat from Petoskey, Michigan to its Detroit warehouse and silo. It has had an f.o.b. price for delivery to trucks there since the warehouse was opened October 25, 1925.[51] Petoskey has always permitted dealers to load their trucks at its silo.[52]

Since closing its Detroit warehouse, Aetna delivers into Detroit by company controlled trucks from its Bay City mill,[53] These contract truckers are paid the same amount as rail freight except for delivery to a small zone around the mill and Aetna was unable to negotiate lower truck rates.[54]

TOLEDO, OHIO:

Huron has a packing plant and Aetna had a warehouse in Toledo and Medusa has a mill at Silica in the Toledo metropolitan district. Pittsburgh established warehouses to serve this market at nearby Bowling Green and Defiance. Wolverine trucks in from its Coldwater and Quincy, Michigan, mills.

Medusa's price policies for sales to customers' trucks at the mill were as follows:

a. Original policy: delivered price Toledo less freight to Toledo.

b. July 26, 1930: base price plus arbitrary 15¢ minimum freight.

c. January 28, 1931: prevailing price f.o.b. cars less 15¢ arbitrary freight minimum.

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[51] Lucas, Vice President, Petoskey (R) Tr. 38787.

[52] Id. Tr. 38722, 38728.

[53] Calvin, President, Aetna (R) Tr. 29959.

[54] Id. Tr. 30189-90.

d. March 23, 1931: to Toledo dealers, delivered price less arbitrary freight minimum. All other destinations, delivered price less rail freight.

e. April 2, 1931: all points, delivered price less rail freight.

f. March 31, 1932: within 50 mile zone only. Price in company controlled trucks, rail delivered price. Price for delivery to customers' trucks, destination price with no allowanee.

g. October 4, 1932: trucking confined to Lucas and Cuyahoga counties. (Toledo and Cleveland are in these counties.)[55]

Huron started trucking at the date of the building of the plant, about 1929.[56] The history of Huron's price policies here is substantially the same as at its Detroit and Cleveland packing plants, *supra*, p. 1467, *infra*, p. 1471. However, at first Huron confined truck delivery to Lucas County (Toledo is in this county), then extended it to some adjacent counties and then withdrew to Lucas County in the face of criticism and then extended it again but not to quite as many counties and that is the way it is now. Huron gave the customer the option of rail or delivery in company controlled trucks at the same price.[57] The detail as to these changes is that the Toledo plant price was quoted May 25, 1931. On June 24, 1935 Huron quoted for rail or truck delivery at the same price in 12 counties surrounding Toledo. On September 7, 1935 Huron discon-

[55] Com. Ex. 970-14 W, 15 M: Medusa answer to Burns-Clark questionnaire.

[56] Crapo, Vice President, Huron (C) Tr. 11370.

[57] Id. Tr. 11071-74.

tinued trucking in the 11 counties around Toledo and on May 25, 1936 Huron quoted truck or car delivery in 5 counties around Lucas County. At all times Huron trucked into Lucas County.[58]

Wolverine, with its mills at Coldwater and Quincy in southern Michigan, makes 95% of its shipments by company controlled trucks. Its price policy since March 11, 1933 has been to deliver at the lowest delivered price in the market and when dealers come in their own trucks they are charged f.o.b. their destination with no freight allowed.[59] Prior to June 5, 1936 Wolverine delivered in trucks into Ohio only in Lucas County but on that date it took in five more counties to meet the announcements of competitors and since then it has trucked into these six counties.[60]

Pittsburgh with its mill at Fultonham, Ohio, established warehouses at Bowling Green & Defiance, Ohio, to meet the truck competition of Huron and Medusa. Pittsburgh sold at delivered prices from the warehouses in company controlled trucks because competitors were doing the same thing. This was in August, 1935. Pittsburgh now trucks into six counties around the Toledo area.[61]

Standard, with its mill at Painesville, Ohio, on Lake Erie east of Cleveland announced on May 27, 1936 that it

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[58] Meyers, Traffic Manager, Huron (R) Tr. 33419, 33420-22, 33426.

Resp. Ex. 3120 H: Letter dated 6/24/35, Rooney, Vice President, Huron, to Gibsonburg Coal & Ice Co.

[59] Nelson, J. L. Vice President, Wolverine (R) Tr. 35920, 35899, 35918-19.

[60] Id. Tr. 36096-08.

Resp. Ex. 2635: Letter dated 6/5/36, Nelson, Sales Manager, Wolverine to Byron.

[61] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37851-53, 37871, 37874-76.

would deliver by truck to dealers' warehouses or to the job at its rail delivered price at points in northwestern Ohio.[62]

In evidence also are instructions from Diamond to salesmen dated August 6, 1935 that due to the opening of trucking in twelve named counties in northwestern Ohio salesmen are not to quote prices without consulting the home office and instruction dated September 4, 1935 that effective immediately Diamond will only make truck deliveries into Lucas and Cuyahoga Counties.[63]

CLEVELAND, OHIO:

Huron has a packing plant here and Great Lakes (Lehigh) has one to which cement is brought in bulk by boat from Buffalo. Universal Atlas, Alpha, Medusa, and Aetna have or have had warehouses there and a few mills deliver into the market by truck.

Huron's price policies for trucking have been, as follows:[64]

a. Before 1930: delivered price with rail freight allowed.

b. May 25, 1931: f.o.b. mill price without regard to destination.

c. August 10, 1932: delivered rail price to all points within 30 miles.

d. October 4, 1932: truck delivered price in company controlled trucks 5¢ higher than rail delivered

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[62] Resp. Ex. 1781: Letter dated 5/27/36, Davis, Vice President, Standard to Avery.

[63] Com. Ex. 1927: Interoffice memo dated 8/6/35, Raff, President, Diamond to all salesmen.

Com. Ex. 1928: Interoffice memo dated 9/4/35, Raff, President, Diamond to all salesmen.

[64] Meyers, Traffic Manager, Huron (R) Tr. 33489-97.

price. If buyer came to the plant with his truck he was probably quoted the same price.

e. January 29, 1935: same but dropped the 5¢.

f. At some later unspecified date: f.o.b. mill price without regard to destination which is about 20¢ lower than the rail delivered price.

At present Huron sells to two dealers in Cleveland who come to the plant with their own trucks and are sold at an f.o.b. mill price which is 20¢ lower than the delivered price in Cleveland.[65]

Medusa established a warehouse in 1930 to which it shipped packaged cement from its Baybridge mill (about 60 miles from Cleveland) but after 8 months it was discontinued because it was more economical to deliver in company controlled trucks from this mill. This was necessary to meet the competition of companies that shipped in by water and redistributed by trucks or that had warehouses serving trucks.[66] Medusa's price policies for sales to customers trucks at the Baybridge mill (located in the outskirts of Sandusky) were as follows:

a. Original policy: f.o.b. cars Sandusky less freight to Sandusky.

b. July 26, 1930: f.o.b. mill base price plus 15¢ arbitrary minimum freight.

c. February 3, 1931: same as "a" plus 15¢.

d. February 20, 1931: f.o.b. mill less 15¢ arbitrary freight minimum.

e. March 23, 1931: policy in "d" confined to Sandusky dealers only. Other destinations: delivered price less rail freight.

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[65] Meyers, Traffic Manager, Huron (R) Tr. 33593-94, 33600-02.

[66] Dawson, Vice President, Medusa (R) Tr. 40036, 40507-08.

f. April 2, 1931: all destinations sold at delivered price less rail freight.

g. March 31, 1932: within 40 mile zone only. Price in company controlled trucks, rail delivered price. Price for delivery to customers' trucks, destination price with no allowance.

h. October 4, 1932: trucking confined to Cuyahoga and Lucas counties (Cleveland and Toledo are in these counties).[67]

Universal Atlas established its warehouse because competitors were already trucking. Delivery is made in company controlled trucks though occasionally customers come to the warehouse in their own trucks. In practically all cases they prefer the former method. In either case the price quoted is a Cleveland price.[68]

Cleveland had always been one of Lehigh's strongest markets but after Huron established its packing plant there Lehigh found it increasingly difficult to hold its position there and early in 1929 it established a clinker grinding plant there to which clinker was brought by boat from Buffalo. At first Lehigh delivered only in carload lots but this did not work out very successfully and by 1931 Lehigh began to meet the Huron competition by truck sales. Its pricing policy "is simply one on our part of meeting competition established by the Huron Cement Company and meeting that competition just as we find it." In this area when Lehigh makes delivery by truck it quotes the same price as if it makes delivery by rail.[69]

[67] Com. Ex. 970-13 R,-14 F: Medusa answer to Burns-Clark questionnaire.

[68] Stone, Vice President, Universal Atlas (R) Tr. 35152.

[69] Bowen, Vice President, Lehigh (R) Tr. 26880-82, 27267-69.

Alpha also had a warehouse here at which deliveries were made to dealers' trucks. This was abandoned because "the going in that market got even a little too hard for us to stand up under."[70] Aetna had a warehouse but it, too, was given up when Calvin came with Aetna in August, 1936. He testified:

> "It was just about the most expensive, most unbusinesslike proposition that I could imagine. Why, it was just absurd. It cost so much money * * * we quit that in a hurry."[71]

Standard, Diamond and Bessemer delivered into Cleveland in company controlled trucks.[72]

Castalia with its mill located at Sandusky about half way between Cleveland and Toledo has sold to customers' trucks ever since the mill has been operating at the prevailing delivered price at destination less rail freight to that destination.[73]

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[70] Coogan, Vice President, Alpha (R) Tr. 23651, 23727-29.

[71] Calvin, President, Aetna (R) Tr. 30078-79.

[72] Standard: Com. Ex. 3169 F shows prices from May 29, 1931 to January 4, 1932 delivered by truck into Cleveland.

Diamond: Com. Ex. 1926, announcement dated January 30, 1935 of prices for delivery by company controlled trucks into Cuyahoga County same as carload prices. Com. Ex. 1928 announcement dated September 4, 1935 limiting truck deliveries to Cuyahoga and Lucas Counties. Com. Ex. 971-13 J-K shows earlier policy of truck delivered price 5c. over rail delivered price and on February 1, 1935 the 5c. eliminated as shown by Com. Ex. 1926 above in order to meet Huron's action.

Bessemer: Warren, F. B., Vice President, testified as to delivery by truck at the same delivered price as for rail shipment to Cleveland but in no case have truck rates been lower than rail rates while in some cases they have been considerably above. (R) Tr. 32252-58.

[73] Com. Ex. 3121 C: Letter dated March 15, 1932, Castalia to Federal Trade Commission.

2. Tables by Districts (except District No. 4)

DISTRICT No. 1

Company	Mill	Price Policy
Lehigh	Sandt's Eddy, Pa. Ormrod, No. 2, Pa. Ormrod, No. 3, Pa. West Coplay, Pa. Bath, Pa. Union Bridge, Md.	No uniform policy: some sales f.o.b. mill base price; some f.o.b. mill lower than base price; some delivered prices using hired trucks; most delivered price with rail freight allowed adjusted to meet competition, Com. Ex. 969-14 M; Tr. 26837, 26841. See also Com. Ex. 3143.
	Fogelsville, Pa.	Special competitive prices, Tr. 26843-44.
Penn-Dixie	Nazareth, Pa. Penn Allen Bath, Pa.	Delivered price: base plus lowest trucking charge to destination, Com. Ex. 968-5 P, -6 F.
Nazareth	Nazareth, Pa.	f.o.b. mill at maximum mill net, Com. Ex. 969-9 o; Tr. 28133-34, 28454-55.
Lone Star	Nazareth, Pa.	f.o.b. mill base price, Com. Ex. 969-3 E, 3185 N; Tr. 32857-58.
Keystone	Bath, Pa.	f.o.b. mill base price, Com. Ex. 969-12 S.
Universal Atlas	Northampton, Pa.	Delivered price: base plus lowest trucking charge to destination, Com. Ex. 968-4 H.
Alpha	Martins Creek, Pa.	f.o.b. mill base price, Com. Ex. 968-8 i; Tr. 24766-67.
Lawrence	Siegfried, Pa.	f.o.b. mill base price, Com. Ex. 969-6 P.
Coplay	Coplay, Pa.	f.o.b. mill base price, Com. Ex. 969-8 Y.
Giant	Egypt, Pa.	f.o.b. mill base price, Com. Ex. 969-10 Z.
Hercules	Stockertown, Pennsylvania	f.o.b. mill base price, Com. Ex. 969-10 i.

Company	Mill	Price Policy
Allentown	Evansville, Pa.	net realized from carload business to adjacent territory plus extra handling costs, Com. Ex. 971-30 i.
Valley Forge	W. Conshohocken, Pennsylvania	net realized from carload business to adjacent territory plus extra handling costs, Com. Ex. 971-30 I.
Medusa	York, Pa.	rail delivered price less rail freight, Tr. 40071.
Edison	New Village (Stewartsville), New Jersey	f.o.b. mill price, Com. Ex. 969-8 H; Resp. Ex. 2566 E, W.
Vulcanite	Vulcanite (Phillipsburg), New Jersey	Higher price than if shipped in carloads, Com. Ex. 969-7 R.
North American	Security, Md.	rail delivered price less rail freight, Com. Ex. 969-4 K.
DISTRICT No. 2		
Lone Star	Hudson (Hudson Upper), N. Y.	f.o.b. mill base price, Com. Ex. 969-3 V, 3184 L, M.
Universal Atlas	Hudson, N. Y.	f.o.b. mill base price, Com. Ex. 968-4 Y.
North American	Howes Cave, New York Catskill, N. Y.	rail delivered price less rail freight, Com. Exs. 969-4 W, 5 Z, 968-14 M.
Alpha	Cementon, N. Y. (Catskill)	f.o.b. mill base price, Com. Ex. 969-2 E, F.
	Jamesville, New York	delivered price at nearest principal market (Syracuse, N. Y.) less figure of average trucking cost to that market, Com. Ex. 968-9 H; Tr. 23667-69, 24763-65.
Glens Falls	Glens Falls, New York	f.o.b. mill base price, Com. Ex. 969-13 J.

Company	Mill	Price Policy
Penn-Dixie	Portland Point, New York	rail delivered price less rail freight, Com. Ex. 968-6 X.
Lawrence	Thomaston (Portland), Me.	f.o.b. mill base price, Com. Ex. 969-7 F.
Huron	Buffalo, N. Y. (packing plant)	Before May 25, 1931: met competitive delivered prices with freight allowed.
		May 25, 1931 to March 10, 1933: f.o.b. plant price.
		After March 10, 1933: rail delivered prices in company controlled trucks, Tr. 33309-10, 33428-30, 33486-88, 33690-91; Com. Exs. 3155 B, 422 o, Resp. Ex. 2381 A-B.
	Oswego, N. Y. (packing plant)	f.o.b. plant for trucks, Tr. 33434-35. Delivered prices in company controlled trucks at delivery-by-rail prices plus 5¢ from December 1933 to July 1935 and again plus 5¢ from September 1935 to September 1937, Tr. 33438-39; Com. Ex. 1010.
Lehigh	Oswego, N. Y. (warehouse)	met Huron competition, Tr. 27267.
Great Lakes (Lehigh)	Buffalo (Hamburg,	f.o.b. mill base price to customers' trucks and delivered prices in company controlled trucks, Tr. 26878-79, 27267.
Federal	Buffalo, N. Y. Lackawanna), N. Y.	f.o.b. mill base price until December 15, 1932; then delivered price with no freight allowance plus 5¢ for emergency only; delivered prices in company controlled trucks, Com. Ex. 970-10 P; Tr. 30635-36, 30629.

DISTRICT No. 3 (Except Points on Great Lakes—Toledo, Cleveland and Other Points in Northern Ohio)

Company	Mill	Price Policy
Alpha	Manheim, W. Va.	no definite policy, trial and error; flat mill price, arbtirary on each job, Tr. 23698-99; Com. Ex. 969-1 D.
Universal Atlas	Universal, Pa. (16 miles out of Pittsburgh)	f.o.b. mill base price, Com. Ex. 970-13 C; 3141 J.
	Pittsburgh, Pa. (warehouse)	established late 1930 or early 1931 at cost of about $200,000 to meet competition of delivery to trucks at Pittsburgh mill of Green Bag, Pa. Sold f.o.b. trucks at warehouse at the base price at its Universal, Pa. mill, Tr. 35184-85; Com. Ex. 3141 J.
Pittsburgh	Pittsburgh, Pa. (warehouse)	established a little warehouse to meet this same competition and sold from warehouse f.o.b. trucks, Tr. 37850-51.
Lehigh	Pittsburgh, Pa. (warehouse)	In 1930, established warehouse to meet this same competition. Competition affected Lehigh's business to such an extent that it had to establish warehouse to hold any part of its business there, Tr. 26869-70.
Medusa	Pittsburgh, Pa. (warehouse)	established April 13, 1931 to meet same competition, Tr.40037, Resp. Ex. 3189, Dawson, Vice President, testified that he did not know on what basis Medusa sold cement from this warehouse, whether f.o.b. truck or not, Tr. 40662-63.

Company	Mill	Price Policy
West Penn	West Winfield (Butler), Pennsylvania	f.o.b. trucks at mill Jan. 1, 1929 to May 12, 1931: answer to FTC questionnaire, 1931, Com. Ex. 3134. Hired truckers to deliver cement into Pittsburgh at what West Penn ascertained to be cost of cement trucked from warehouses in Pittsburgh. Necessary to do this to get business from customers formerly served by rail, Tr. 27790-91.
Medusa	Wampum, Pa.	before July 26, 1930: prevailing f.o.b. cars Wampum less 25¢ minimum freight.
		July 26, 1930 to March 13, 1931: f.o.b. mill base price plus 15¢ arbitrary minimum freight.
		After March 13, 1931: same as before July 26, 1930, Com. Ex. 970-14 i.
Pittsburgh	Fultonham (E. Fultonham), (Zanesville), Ohio	rail delivered price less rail freight, Com. Ex. 969-1 R; Tr. 37849-50. Resp. Exs. 2874, 2876 are examples of meeting competitive truck prices in Akron, Ohio.
Southwestern	Osborn, Ohio	rail delivered price less rail freight except November 1, 1930 to May 4, 1931 when f.o.b. mill price of highest mill net plus 15¢, Com. Ex. 970-3 H, Resp. Exs. 1776-1778.
Superior	Superior, Ohio	during short period when company trucked, buyer paid rail delivered price at job and company paid truck cost—in most cases an amount equal to rail rate to nearest rail station, Com. Ex. 970-5 H, 971-14 K.
Alpha	Ironton, Ohio	f.o.b. mill base price, Com. Ex. 970-15 Q.

DISTRICT No. 5 (Except Points on the Great Lakes—Chicago, Milwaukee and Manitowoc)

Company	Mill	Price Policy
Kosmos	Kosmosdale, Ky.	rail delivered price less rail freight, Com. Ex. 970-1 D. Road jobs close to mill sold at base price, Tr. 37021.
Louisville	Speed, Ind.	prices for truck deliveries "have as a rule been rather high". During 1932 met competitive delivered prices at points within trucking radius, Com. Ex. 975-18 o.
Lehigh	Mitchell, Ind.	met competitive truck prices quoted by nearest competitive mill at Speed, Ind., Tr. 26885.
Lone Star	Limedale, Ind. (Greencastle)	f.o.b. mill base price except for limited number of jobs in 1931 sold at rail delivered price less rail freight, Com. Ex. 975-17 T; Tr. 32857.
Alpha	La Salle, Ill.	f.o.b. mill base price, Com. Ex. 975-19 R, -19 S.
Medusa	Dixon, Ill.	Prevailing price Dixon f.o.b. cars less 15¢ arbitrary minimum freight.
		July 26, 1930 to February 5, 1931: f.o.b. mill base price plus 15¢.
		Febr ·ry 5, 1931 to March 18, 1931: f.o.b. cars less 10¢ arbitrary minimum freight, Com. Ex. 975-17 C.

DISTRICT No. 6

Company	Mill	Price Policy
Lehigh	Fordwick, Va.	rail delivered price less rail freight, Tr. 26863-65.
Lone Star	Norfolk (South Norfolk), Virginia	carload delivered price in Norfolk, Com. Ex. 970-2 G, 971-9 O.
Volunteer	Caswell (Knoxville), Tenn.	sometimes rail delivered price less rail freight and other occasions Knoxville mill price, Com. Ex. 976-10 I, 971-14 P; Tr. 31468, 33002.
Penn-Dixie	Kingsport, Tenn.	rail delivered price less rail freight, Com. Ex. 975-6 Z.
	Richard City, Tennessee	prior to May, 1931, rail delivered price without any allowance. After that f.o.b. mill, Com. Ex. 975-8 H; Tr. 38150-51.
	Clinchfield, Georgia	f.o.b. mill, Com. Ex. 975-9 o; Tr. 38150-51.
Signal Mountain	Chattanooga, Tennessee	rail delivered price less rail freight, Com. Ex. 975-12 Z.
Cumberland	Cowan, Tenn.	rail delivered price less rail freight, Com. Ex. 976-12 N, 3132; Tr. 39840-41, 39890.
Hermitage	Nashville, Tenn.	rail delivered price less rail freight, Com. Ex. 976-10 T; Tr. 36124. After Feb. 11, 1933, same but no freight allowed, Tr. 36182-83.
Georgia	Portland, Ga.	rail delivered price less rail freight or "destination price protected allowing truck freight on basis railroad rate", Com. Ex. 975-1 D.

Company	Mill	Price Policy
Southern States	Rockmart, Ga.	fixed arbitrarily up to January 1, 1933 after that dealers price, Rockmart. Also rail delivered price less rail freight, Com. Ex. 976-15 F; Tr. 37610.
National	Ragland, Ala.	rail delivered price less rail freight, Com. Ex. 976-9 X; Tr. 39581.
DISTRICT No. 7		
South Dakota State Cement Plant	Rapid City, S.D.	f.o.b. mill base price plus 25¢ extra charge for loading trucks, Tr. 41535-36, 41592.
Huron	Duluth, Minn. (packing plant)	Sept. 15, 1933 to date: f.o.b. plant price for trucks lower than price for rail delivery, Tr. 33326-27.
Universal Atlas	Duluth (Steeton), Minn.	f.o.b. mill base price, Com Ex. 975-2 v; Tr. 35154-56.
	Hannibal, Mo.	f.o.b. mill base price, Com. Ex. 975-1 p.
Northwestern States	Gilmore City, Iowa	rail delivered price less rail freight, Tr. 36486.
Hawkeye	Des Moines, Iowa	rail delivered price less rail freight, Com. Ex. 976-12 y; Tr. 12817.
Penn-Dixie	West Des Moines (Valley Jct.), Iowa	rail delivered price less rail freight, Com. Ex. 976-3 w.
Dewey	Linwood (Davenport), Iowa	at first, rail delivered price less allowance for trucking greatly in excess of rail rates and varying in three or four zones depending on distance from mill, Com. Ex. 976-3 i; Tr. 47242-43.
Alpha	St. Louis, Mo.	no clearly defined policy other than minimum f.o.b. mill base price, Com. Ex. 975-19 s, -4 b.

DISTRICT No. 8

Company	Mill	Price Policy
Nebraska	Superior, Neb.	rail delivered price less rail freight, Tr. 42046. To Superior, Neb. dealers, 5¢ allowance which approximately offset rail switching charge. After 1934, no allowance, Com. Exs. 971-17 T, 976-4 L.
Ash Grove	Louisville, Neb. Chanute, Kan.	rail delivered price less rail freight; later arbitrary above maximum mill price, Com. Ex. 976-7 P, -6 X.
Lone Star	Bonner Springs (Kansas City), Kan.	1924-1925: f.o.b. mill base price; then rail delivered price less rail freight; then f.o.b. mill base price, Com. Ex. 967-16 M; Tr. 32857-58.
Missouri	Sugar Creek (Kansas City), Mo.	1921-1932: f.o.b. mill truck load price, Com. Ex. 3117 L.
Consolidated	Fredonia, Kan.	rail delivered price less rail freight, Com. Ex. 976-5 J.
Monarch	Humboldt, Kan.	competitive rail delivered price less rail freight, Com. Ex. 976-8 K.
Universal Atlas	Independence, Kan.	f.o.b. mill base price, Com Ex. 967-15 B, 3141 I-J.
Dewey	Dewey, Okla.	Since 1912, rail delivered price less rail freight, Com. Ex. 976-11 E; Tr. 46643-46, 47224-25.
DISTRICT No. 9		
Trinity	Dallas (Eagle Ford), Texas	on shipments to points east of Dallas: f.o.b. mill Harrys base price less 4¢; to points west of Dallas: f.o.b. mill Harrys base price, Com. Ex. 976-13 K.

Company	Mill	Price Policy
Lone Star	Harrys (Dallas), Texas	f.o.b. mill base price or same plus 10¢ for delivery into Dallas, Com. Ex. 976-13 Y; Tr. 32842, 32844-46.
	Manchester (Houston), Texas	f.o.b. mill base price, Com. Ex. 976-1 D.
Trinity	Houston, Texas	f.o.b. mill base price, Tr. 32846, 32850.
Southwestern	El Paso, Texas	rail delivered price less rail freight, Com. Ex. 976-1 X. After Jan. 27, 1936 same plus 25¢ later reduced to 10¢ or 15¢; Resp. Ex. 2970; Tr. 38914, 39339. For Arizona & New Mexico points rail delivered price less rail freight for delivery via common carrier and dealer-owned trucks, Tr. 39343-44.
Republic	Long Horn (San Antonio), Texas	rail delivered price less rail freight, Com. Ex. 976-2 S.
District No. 10		
Colorado	Portland, Colo.	rail delivered price less rail freight, Com. Ex. 967-11 R.
	Boettcher, Colo.	rail delivered price less rail freight, Com. Ex. 967-13 L.
Idaho	Inkom, Idaho	f.o.b. mill price, Com. Ex. 967-6 R.
Three Forks	Trident, Mont.	rail delivered price less rail freight, Com. Ex. 967-12 H.
	Hanover, Mont.	rail delivered price less rail freight, Com. Ex. 967-14 H.
Utah	Salt Lake City, Utah	f.o.b. mill price Jan. 1, 1929 to May 1, 1932: answer to FTC questionnaire, 1931, Com. Ex. 3137.

F. Price Policies; The 15¢ Differential.

1. Districts 1 and 2: 1929-1930

The following is a list of 15 companies and mills in Districts 1 and 2 showing, in chronological order, the dates of adoption of the 15¢ differential in so far as such dates appear in the record. Following this list is a list of 17 companies and mills that adopted the differential but as to which the record does not reveal the date of adoption and after that is a list of 6 companies and mills (and two packing plants) that did not adopt it.

Date of Adoption	Company & Mill	Citation
Sept. 6, 1929	Nazareth: Nazareth, Pa.	Resp. Ex. 704
Oct. 3, 1929	Penn-Dixie: Nazareth, Pa.	Com. Ex. 2854
	Penn: Dixie: Penn Allen, Pa.	"
	Penn Dixie: Bath, Pa.	"
Oct. 16, 1929	Medusa: York, Pa.	Com. Ex. 970-11 Q
Oct. 23, 1929	Alpha: Jamesville, N. Y.	Com. Ex. 968-10 H
Oct. 25, 1929	Lone Star: Nazareth, Pa.	Com. Ex. 969-3 E
Nov. 25, 1929	Alpha: Martin's Creek, Pa.	Com. Ex. 968-8 I
Nov. 25, 1929	North American: Howes Cave, N. Y.	Com. Ex. 2857
Nov. 25, 1929	Glens Falls, Glens Falls, N. Y.	Com. Ex. 2857
Dec. 21, 1929	Penn-Dixie: Portland Point, N. Y.	Com. Ex. 968-6 X
Dec. 21, 1929	Universal Atlas: Northampton, Pa.	Com. Ex. 968-4 H
Dec. 21, 1929	Universal: Hudson, N. Y.	Com. Ex. 968-4 Y
June 14, 1930	" " "	Tr. 35153, Com. Ex. 3141 J
June 16, 1930	Alpha: Cementon, N. Y.	Resp. Ex. 705
June 21, 1930	Lone Star: Hudson, (Upper Hudson), N. Y.	Com. Ex. 969-3 V

Companies and mills that adopted the differential but date of adoption not shown:

Company and Mill	Citation
Allentown: Evansville, Pa.	Tr. 7627-28
Coplay: Coplay, Pa.	Com. Ex. 969-8 Y
Edison: New Village, Stewartsville, N. J.	Com. Ex. 969-8 H
Giant: Egypt, Pa.	Com. Ex. 969-10 Z
Hercules: Stockertown, Pa.	Com. Ex. 969-10 L
Keystone: Bath, Pa.	Com. Ex. 969-12 S
Lawrence: Siegfried, Pa.	Com. Ex. 969-6 P
Thomaston (Rockland), Me.	Tr. 7274
Lehigh: Sandt's Eddy, Pa.	Com. Ex. 969-14 M-O
Ormrod, Pa.	"
West Coplay, Pa.	"
Bath, Pa.	"
Fogelsville, Pa.	"
Union Bridge, Md.	"
North American: Catskill, N. Y.	Com. Ex. 969-5 Z
Security, Md.	Com. Ex. 969-4 K
Vulcanite: Vulcanite (Phillipsburg) N. J.	Com. Ex. 969-7 R

Companies and mills that did not adopt the differential:

Company and Mill	Citation
Federal: Buffalo, (Hamburg, Lackawanna), N. Y.	Tr. 30631
Great Lakes: Buffalo, N. Y.	No evidence
Huron: Buffalo, N. Y. packing plant	Tr. 11366
Oswego, N. Y. packing plant	Tr. 11366
Lehigh: Oswego, N. Y. warehouse	No evidence
Universal Atlas: Oswego, N. Y. warehouse	No evidence
Valley Forge: West Conshohocken, Pa.	No evidence
Whitehall: Northampton (Cementon), Pa.	No evidence

a. Circumstances of adoption: General Evidence

Evidence of the circumstances surrounding the adoption of this differential by most of the companies having mills in the Lehigh Valley, New Jersey and New York start with a Penn-Dixie memorandum dated July 25, 1929 from W. S. Wing, Vice President, to B. S. Smith, President, reading as follows:

[Italicized part quoted in Fdgs. Par. Eleven (c)]

"A plan is being developed to improve the trucking situation, particularly in the Lehigh Valley.

I understand this morning that the plan as now contemplated puts in a minimum price F.O.B. destinations of $2.44 cloth, and a price F.O.B. trucks at all mills in the Lehigh Valley and New Jersey districts of $2.40 cloth.

I will have additional information for you on this subject next Tuesday." (Com. Ex. 2853)

This document was identified and introduced by the Commission after Wing had left the witness stand[1] and no further evidence is in the record dealing with the subject matter of this inter-office memorandum.

On October 3, 1929 Wing issued "Price Instructions" to Penn-Dixie sales offices confirming verbal instructions and reading in part as follows:

"Competitive quotations found in the field since September 27 indicate clearly that those prices that we have found F.O.B. different destinations in the Lehigh Valley and in Northern New Jersey after deducting freight net each competitor's individual mill $1.85 gross including sacks, and two discounts, on rail shipments. All these quotations bear the notation that cement in cloth F.O.B. trucks is quoted at $2.00 gross, or in other words, 15¢ per barrel more

[1] Wing testified at Tr. 8071-174; Com. Ex. 2853 was identified and received in evidence at Tr. 17183-87.

for cement on trucks at plants than the gross net price for rail shipments at each plant in the Lehigh Valley and the three plants in New Jersey.

You are, therefore, authorized to quote for rail shipments $1.85 gross our three Lehigh Valley plants and $2 gross fob trucks our three Lehigh valley plants effective immediately." (Com. Ex. 2854)

About two months later, on November 29, 1929, D. S. MacBride, Vice President, Lone Star, wrote to Garner Beckett, President, Riverside and said in part:

"Eastern Pennsylvania and Northern New Jersey have for the past few years been a veritable madhouse. Indiscriminate trucking has brought forth greater and greater concessions by producers, until it finally reached the point at which manufacturers were absorbing thirty and forty cents a barrel in order to lay cement down by truck on the job. Whenever a manufacturer makes a delivered price by truck, or employes a trucker, only trouble and suspicion can result. An attempt has been made to correct this condition by placing a truck price on the various mills. This price is generally 15¢ a barrel higher than the carload price. Most manufacturers have now refrained from employing trucks but allow the contractor or the dealer to engage transportation from the mill to the job. The charge is the mill truck price on board the customer's trucks. The tendency of this method is to limit trucking to within 12 or 15 miles of the mill. In the case of Philadelphia, with a mill at West Conshohocken, about twelve or fourteen miles from City Hall, a 5,000,000 barrel market is pretty well shot to pieces by this practice." (Com. Ex. 1203 UU)

Two years after this, on September 3, 1931, John Duffy, Vice President of the Lehigh Valley Railroad Company wrote to R. N. Collyer, Chairman, Traffic Executive Association—Eastern Territory relative to his conference with cement shippers regarding the trucking situation. He wrote in part:

[Italicized part quoted in Fdgs. Par. Eleven (e)]

"This is to advise that I have called upon Mr. Blaine S. Smith, President of the Pennsylvania Dixie Portland Cement Company, and Messrs. C. L. Hogan, Executive Vice President, and H. C. Koch, Vice President in charge of Sales of the International Portland Cement Company.

* * *

Mr. Smith of the Pennsylvania Dixie Company manifested a sympathetic attitude toward the Building Supply Dealers with respect to the position they have taken in this matter. On the other hand, he felt that the best way to control the situation was the making of an arbitrary charge on all cement loaded on trucks at the mills. As you are aware, there has been an agreement among the cement companies to make a charge of 15¢ a barrel in this connection, but I am told that all the companies have not strictly adhered to the agreement.

Messrs. Hogan and Koch expressed an attitude similar to that of Mr. Smith and asserted that they were not using trucks in the East, and at their mills outside of Eastern territory they were loaded only when competitive conditions demanded.

From my talks with cement people I have gathered that there is some question as to whether 15¢ a barrel is a proper or fair charge in comection with loading on trucks, but there is general agreement that some such charge should be made. There is also belief that the best opportunity for the building supply people to achieve stabilization would be through obtaining a hard and fast agreement among cement manufacturers to adhere strictly to the rule requiring an arbitrary on truck loading at the mills." (Com. Ex. 1145)

The author of this letter, John Duffy, was asked to explain what he meant when he wrote that there had been * * * "an agreement among the cement companies to make a charge of 15¢ a barrel * * *." He testified:

"A. There has been a great deal of discussion of our desire to get business on the railroads. I naturally did not know of any agreement and whatever

I stated there undoubtedly was—well, an exaggeration as it is being applied here. What I was concerned with here was that we got the business on the railroads and I knew nothing of any agreement of any sort among the cement people. I was more interested in the agreement that they would ship by railroad.

By Examiner Norwood:

Q. Had they agreed with you? A. No, sir, they had not.

Q. Then you just stated something that wasn't true? A. That is—as I say, it was an exaggeration.

* * *

By Mr. Leisure:

Q. And did you mean to convey to Mr. Collyer that you had any personal knowledge, and, did you have any personal knowledge, on September 3, 1931, that any cement companies had agreed to anything among themselves about fifteen cents a barrel? A. I had neither the knowledge nor did I intend to convey that information.

Q. Now, I notice in the next paragraph, Mr. Duffy, you state that Messrs. Hogan and Koch expressed an attitude similar to that of Mr. Smith. Did you mean to convey to Mr. Collyer in this letter on that day that Mr. Hogan's company or Mr. Koch's company had entered into any agreements either with you or with anyone else with respect to fifteen cents a barrel on cement? A. I did not.

Q. I notice in the last paragraph you used the phrase 'general agreement that some charge should be made.' What did you mean by that? A. May I see that?

Q. Yes. Look at it, right in the third line in the last paragraph (handing paper). A. I would say that that was probably the wish being father of the thought to a considerable degree. We were anxious to have each one of them agree to put this charge of fifteen cents a barrel on. We found some sympathetic attitude towards the railroads in the matter, but that was all I intended to imply.

* * *

Q. So following your last answer you want the Examiner to understand that when you were working on this proposition, and you found someone who had expressed a sympathetic attitude, that you may have described that to someone else as an agreement—they have a sympathetic attitude—or do you want the Examiner to understand, and did you intend to convey when you wrote it that you knew of some agreement between the cement companies to do this? A. Answering your last question first, I know nothing of any such agreement. I have no knowledge of any such thing. And my whole effort, and my whole purpose in writing that letter was to show that we were making some progress in endeavoring to prevail upon the several cement companies who were assigned to me—you understand, this was divided among a group of traffic executives—that among those that I called upon, I thought that we were making some progress in getting those individual companies to apply the fifteen cents a barrel charge which we desired.

Q. And you had no intention of implying that there was an agreement between the companies to do it? A. Absolutely not.

Q. Or that they had entered into an agreement with you to do it? A. No—no—I wish I had," (Tr. 7207-11).

When Duffy called at the Penn-Dixie offices he first saw D. S. Browder, Traffic Manager, and upon Duffy's request it was Browder who took Duffy into Smith's office and was present throughout the conference reported in Duffy's letter dated September 3, 1931.[2] In his testimony Browder denied that Smith had made any of the statements attributed to him by Duffy as to an agreement among cement companies to charge 15¢ or as to the making of an arbitrary charge.[3] He testified:

"Q. Mr. Browder, referring again to this conversation that you say you overheard between Mr.

[2] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38451.

[3] Id. Tr. 38457, 38459, 38498.

Smith, Blaine Smith, and Mr. John Duffy, of the Lehigh Valley Railroad, what has Mr. Smith said to you about that conversation since it took place? A. He told me—gave me a paper to read and said to me that, did I say that, and I told him no. He said, 'Well, don't bring any more of your railroad friends in to see me if that is the way they report matters.'

Q. You mean the paper you showed him, or it was shown to you, was this letter of John Duffy's? A. No. It was a Federal Trade Commission's white book that was published." (Tr. 38496)

Further:

"Q. Now, will you tell me what Mr. Smith told you when you brought the—or when the white book was brought to your attention? A. Mr. Smith called me into his office and handed me this white book, opened at this page, and asked me to read this paragraph, pointing to it, and I read it, and he simply said to me, 'Did I say anything like that in my meeting with Mr. Duffy,' and I said 'No,' and he said, 'Well, don't bring any of your railroad friends in here again if they can't report matters more accurately,' and that is all that was said about it, and I walked out, and was pretty glad to get out at the time." (Tr. 38497-98)

Browder was not permitted to testify as to the conversation between Duffy and Smith and respondents offered to prove "* * * that Mr. Smith told Mr. Duffy that trucking from mills interfered with his mill operations, that it created an additional hazard, that it was more expensive to the Pennsylvania-Dixie Company to handle deliveries to trucks than it was to ship by rail, that the Penn-Dixie Company was charging 15 cents above the base price at its respective mills, on shipments by trucks loaded at the mill for the purpose of compensating the company to some extent for the additional cost, and inconvenience of loading trucks, and that Mr. Smith also told Mr. Duffy that he, Mr. Smith, did not like the policy of loading trucks at the mills,

but that the company could do nothing about it because it was necessary for it to be competitive with other companies which did load trucks at the mills, and they would continue to load them at the mills for the purpose of being competitive."[4]

C. L. Hogan and H. C. Koch, described in Duffy's letter as Executive Vice President and Vice President in Charge of Sales of International (now Lone Star), are reported as having expressed an attitude similar to that of Smith.

As to that, Hogan testified:

> "Q. Mr. Hogan, do you recall ever having any conferences with a Mr. Duffy, vice president of the Lehigh Valley Railroad? A. I do not.
>
> Q. Has he ever called at your office, to your knowledge? A. Not to my knowledge.
>
> Q. You say not to your knowledge. Would you have been available—I mean, would you have known about it if Mr. Duffy had called? A. I know Mr. Duffy has not been in my office. It is possible he has been in the traffic departments." (Tr. 34550-51)

On the same point, Koch testified:

> "Q. Mr. Koch, do you recall having had any conference with Mr. Duffy, of the Lehigh Valley Railroad, at any time? A. I do not. I don't know the gentleman. I have no recollection ever meeting him. We have no mill on their line." (Tr. 33138)

J. P. Callaghan, a dealer of Harrison, N. J. testified that in about 1931 he incorporated a company to truck cement from mills directly to his plant and that he trucked for about a year and a half.[5] As to the 15¢ differential, he testified:

> "Q. Did the cement manufacturers at any time during the period that you engaged in trucking cement to your place of business impose any charges

[4] O.P. Tr. 38456.

[5] J. P. Callaghan (C) Tr. 7622.

for loading trucks other than the loading of railroad cars at their place of business?

Mr. Leisure: I assume that means the manufacturers that he trucked from?

Mr. MacIntyre: Exactly.

The Witness: In response to that question, the first two or three months there was no difference, but after that, the Edison Cement Company, Mr. Wetzler, called me and I went in to his office and he said that I would have to pay 15 cents a barrel more as that was the charge that they would place on us for any future business. I complained to him for the reason that I had set a price on a particular operation that I was working on and set it on the basis that I was on for two months. He said that it was just too bad, that I would have to pay.

Q. That is, the charge of 15 cents a barrel more for loading of your trucks than he would charge if he sold you f.o.b. railroad cars or sold you for rail delivery? A. At that time he was going to charge me 15 cents more than he had charged me for the first two months I had trucked in there.

Q. Did you inquire of other cement manufacturers at that time as to whether they were imposing similar charges? A. The thing became standard as far as the companies that we were doing business with." (Tr. 7625-26)

b. Circumstances of Adoption: Individual Company Evidence

Executives of ten respondents testified as to the circumstances which led them to charge the 15¢ differential for loading trucks at their mills. This testimony follows.

NAZARETH: H. B. Robeson, Vice President, when questioned as to the reasons that led Nazareth to adopt the 15¢ trucking differential testified:

"Q. What led you, Mr. Robeson, to adopt that policy? A. In the first place, our experience with trucks calling at our mill was a very unsatisfactory one to the operating department, and the fact that

we were up against additional costs as against our rail loading, trucks would call at our mill at all hours of the day and we had no way of anticipating them, and we had no way of regulating them, so we frankly put this on to minimize the amount of trucks and the amount of cement going out of our mill by trucks, or number of calls at the mill by trucks, and also to compensate us for the additional cost we were put to.

Q. At the time you put that on had you formed any conclusion on your own policy as to trucking? Did you have any other thing in mind in putting on the 15 cents charge other than what you have told us? A. Well, the trucking of cement was mixing up our operation entirely at the mill; in addition to the fact that the trucks coming there were beginning to expose us to a hazard——

Q. Did you have any consultation or any kind of contact with your competitors before you put in that 15-cent charge? A. No, sir; we did not.

Q. That caused you to do it? A. No, sir." (Tr. 28135-36)

And further:

"Q. Have you any idea how much more it would cost you to load a truck than it would to load rail? A. No, I have not any idea at the present time. We would have to make very radical changes in our plant. That would be the thing we would have to study.

Q. If transportation of cement by truck became 20 percent of your shipments, why, the cost per barrel would be very low, wouldn't it? A. No. I would say that so long as you had to pay your packers so much per hundred barrels to do it, that the unit cost would hold.

Q. Well, you don't know whether they were 15 cents or 3 cents, as an accurate figure on cost per barrel—— A. Not as a specific statement. I could give you items. I know it would cost us more money to load trucks than it would cars.

Q. In other words, you stick to your position that it does cost you more to load trucks than cars? A. I would say so, yes.

Q. But you don't attempt to say how much more? A. I have never figured it." (Tr. 28450)

In answer to the Burns-Clark Questionnaire, Nazareth gave as its reasons for adoption of a 15¢ differential:

"Extra cost of handling for truck loading—

Inconvenience to plant operation—

Interruption of car loadings—

Necessary increase of facilities to handle trucks—

Increased labor of handling as against car loading—" (Com. Ex. 969-9 o)

LEHIGH: J. C. Bowen, Vice President, when questioned as to the purpose of the 15¢ differential testified:

"Q. What was the purpose of this charge? A. For a time we found some of our competitors quoting f.o.b. mill prices 15 cents per barrel higher than their mill base figures, and to some extent we followed those quotations as a means of recovering at least part of the extra cost of loading trucks as compared to loading cars.

Q. Well, when was this 15-cents charged, Mr. Bowen? A. As I recall it, it was during 1929, although it wasn't a charge that we applied to all our customers, or all our shipments.

Q. Do you know whether your competitors in the Lehigh Valley were following any such practice in respect to a 15-cent differential? A. I found that a great many of them were although I didn't find that they were doing it in any uniform or complete way. What we did: Where we found competitors quoting prices that included such a 15-cent charge, and if we could do it and still have our cement reach destination at a cost that was competitive, we would follow. If we found that our price with 15 cents made the cost of cement at destination higher, we didn't do so.

Q. Now, are there any other instances when you did not? A. By and large, we did not do it in any

case where we found that to do so would make our prices such that our costs at destination would be out of the competition. We made whatever adjustments or prices we felt were necessary to hold the business." (Tr. 26851-52)

And further;

"Q. Do you know what the difference in cost of loading to trucks and loading to cars was? A. I do not know it in detail. I do not know that we ever kept an absolute record. I do know that from observation of conditions that the cost of loading trucks was considerably higher than the cost of loading cars.

Q. Was it more than 15 cents higher? A. I say, we never kept an absolute record, so I am unable to say whether it was more or less. My belief is that it was in the neighborhood of 15 cents.

Q. The reason you used the 15-cent figure, however, was because that is what competitors were using, isn't it? A. Because we found competitors making prices which permitted us in some cases to get that additional charge, and we did." (Tr. 27254)

In answer to the Burns-Clark Questionnaire, Lehigh had this to say about the 15¢ differential:

"From time to time attempts were made by individual manufacturers to establish practices that might relieve the chaotic conditions resulting from trucking abuses. One of those efforts involved charging a mill price for trucking at 5¢ per barrel above the prevailing mill base price. This so-called differential was based on the fact that the cost to the manufacturer for loading trucks was higher than the cost of loading cars, so that a truck price equal to the mill base price really subsidized truck deliveries as compared to car shipments. Our company adopted this practice for a time where competition permitted, but the practice was short-lived and was never generally observed by all mills." (Com. Ex. 969-14 N)

ALPHA: F. M. Coogan, Vice President, when questioned as to the reasons for Alpha's adoption of the 15¢ differential testified:

> "Q. What were your reasons for establishing the differential at this mill? A. We had learned from our field men, and from the reports which we had from our customers, that that policy had been put into effect by a number of companies. And we did not follow it until after a great many companies did it. And inasmuch as we were not a factor in the trucking business, and only quoted for trucking delivery when we were forced to, in order to meet competition; we simply followed along with it and started quoting 15 cents. We were glad to do anything that we possibly could do to discourage trucking, and we had no hesitancy in putting in that rate." (Tr. 23689-90)

And further:

> "Q. Mr. Coogan, were there any factors which led to the use of the 15-cent charge for trucking delivery? A. Well, the additional cost and the disturbance to our business routine at the mill was the most important factor in arriving at that decision." (Tr. 23674)

And further:

> "Q. Well, you could not add this 15 cents per barrel charge for truck delivery, could you, in the face of competitors who were not adding it, or who were adding less than 15 cents? A. Oh, we would not be meeting the lowest price if we tried to add more to our price than our competitors added.
>
> Q. If one mill continued on the basis of having no extra charge for truck delivery at the mill for even a period of 30 days, how could the other mills have put in a 15-cent charge? A. Such a condition could not exist for 30 days, probably not 30 minutes.
>
> Q. Do you mean that a mill could not continue to impose no charge for truck delivery when its competitors were imposing a 15-cent charge? A. Don't you suppose their competitors would meet that competition?

Q. Well, they had been meeting it, hadn't they, before the 15-cent charge was put in effect? Hadn't they been meeting it? A. Well, I don't understand you—I don't understand your question.

Q. You said that it couldn't last 15 minutes because they would meet it, and I said they had been meeting it prior to the imposition of the 15-cent charge, hadn't they? A. Why, certainly, I think that proves my answer, that they meet it at all time, whether it is 15 cents, 5 cents, nothing, or what it is." (Tr. 24768-69)

And further:

"Q. Well, you said this 15-cent charge was—you wouldn't say that it covered your cost exactly, but it was what you thought you ought to have. How did it happen that you thought 15 cents was what you ought to have at the same time other mills thought 15 cents was what they ought to have? A. They thought they could get it, probably." (Tr. 24775)

EDISON: F. A. Sweeney, Vice President, testified as follows as to the reasons for Edison's adoption of the differential:

"Q. Are you familiar with the circumstances which caused your company to make that charge? A. Yes, I am.

Q. Will you tell us about that, please? A. Well, before that charge was assessed, we had discovered that it was costing us considerably more to load trucks at the plant than it did to load freight cars, and when one of our competitors indicated that they were assessing a charge of 15 cents a barrel over and above their regular price for delivery to trucks, why, we immediately adopted the same plan.

Q. Can you tell me, Mr. Sweeney, whether or not at this period in 19—— What was this, 1930 or 1931? A. 1929 to 1932.

Q. Can you tell me whether or not this was the first time that your company had made some extra

surcharge for truck delivery? A. No, I recall that several years prior to that time we had a charge for delivery to trucks over and above our regular price." (Tr. 35764-75)

Q. Do you know whether or not that charge was imposed as the result of any understanding or agreement on the part of your company with any of your competitors? A. To the best of my knowledge, it was not." (Tr. 35677)

And further:

"Q. It was adopted, then—this 15-cent charge was adopted to cover the cost of trucking, and also to prevent trucking, was it not? A. No, no.

Q. To discourage trucking? A. No. That was not done. We never had that thought in mind, to discourage trucking. It did not make any difference to us. It was inconvenient, but we had to meet competition at that time, and had to permit trucking, but we did not put that charge on with any thought of discouraging trucking.

Q. Mr. Sweeney, you are not obliged to match prices or follow the action of your competitors when it is unfavorable to customers, are you? A. At that time we were more concerned with it being more favorable to us. We knew we had additional costs and this 15 cents charge helped us to make up those differences.

Q. It did that, and it also helped to discourage trucking, did it not, whether it was your motive or not, it did help to discourage trucking, did it not? A. Well, I cannot say that that was our experience; trucking continued for two or three years after that.

Q. This same volume of trucking, even with the 15-cent charge as you had before? A. I do not recall. I turned the figures in yesterday on that. I do not recall what they were. You have the figures in the record.

Q. Well, you could not have made a 15-cent charge for trucking if your competitors had not made a 15-cent charge for trucking, could you, Mr. Sweeney? A. Well, if we had, we would not have

gotten any of that business. We have never been able to get a higher price than the other fellow at any time in my experience in the cement business.

Q. In other words, in order for a 15-cent charge for delivery to trucks to prevail in the sales territory in which you do business, all of the cement manufacturers in the area had to adopt a charge? A. You are making that statement, or are you asking me the question?

Q. I am asking you that from your experience. A. I would not say so necessarily.

Q. If one of them did not put the charge on, the others, the rest, as I understand your testimony, would have to withdraw theirs; isn't that true? A. No, that does not necessarily follow there. That one fellow, at least, would not get the—would not get the bulk of the business, perhaps, or get a good part of the business. The question then arises whether he wanted that much trucking business.

Q. Well, now, then, what conferences or communications or exchanges did you have, if any, with your competitors or agents of your competitors with regard to trucking? A. None whatsoever.

Q. You had none? A. No, sir.

Q. You talked to no one, or had no one—— A. No, sir; I did not.

Q. In other words, you picked up the information in the field and followed that? A. That is correct." (Tr. 35831-33)

NORTH AMERICAN: J. J. Porter, President, when questioned as to the reasons for his company's adoption of the 15¢ differential testified:

"Q. Can you tell me briefly what the reasons for that were? A. There was a considerable extra cost in handling trucks and our plants were not equipped to handle trucks conveniently or economically. We had a good deal of labor trouble in connection with the loading of trucks. Our accounting costs, clerical costs, were considerably increased, and it was a nuisance generally. We felt we were entitled to get a service charge for it. Of course, if none of our competitors had made a service charge we couldn't

have—we couldn't have gotten it, but when some competitor put in a 15-cent service charge, why, we were tickled to death to follow that.

Q. As to that, did your company have any arrangement or understanding or agreement with any of your competitor companies that you and they would put in some service charge for truck delivery? A. We did not." (Tr. 33847-48)

PENN-DIXIE: Penn-Dixie in "Price Instructions" dated October 3, 1929 from W. S. Wing to Sales offices said: "Competitive quotations found in the field since September 27 * * *" show a truck price of 15¢ more than for rail shipment "* * * at each plant in the Lehigh Valley & the three plants in New Jersey" and instructed sales offices to make a similar price for trucks at Penn-Dixie mills in the Lehigh Valley.[6]

D. S. Browder, Traffic Manager, testified, after reciting the difficulties Penn-Dixie had experienced with trucking, that:

"Because of all of these factors, when Penn Dixie discovered from quotations picked up in the field that some of its competitors in the Northeast had adopted a policy of charging a 15-cent differential for deliveries to customers' trucks at their mills, it was glad to and did follow that policy." (Tr. 38150-51)

LAWRENCE: J. H. Ackerman, Sales Manager, testified on this subject as follows:

"Q. Did you discuss with any of your competitors, these competitive mills, this trucking problem? A. We may have.

Q. Didn't you know at the time you put your fifteen cent differential on, that others were doing likewise? A. My recollection is that we no doubt picked up quotations to the effect that that was a policy inaugurated by another company, and it sounded good to us and we adopted it.

[6] Com. Ex. 2854.

Q. Not only by one other company, but by a number? A. I really do not remember." (Tr. 7276)

LONE STAR: C. L. Hogan, President, testified on this subject as follows:

"Q. Now, the record shows, with respect to some of its mills, Lone Star had a fifteen cent surcharge, Mr. Hogan, over its mill base for deliveries made to customers' trucks.

What was the purpose of that fifteen cent surcharge, in your case? A. To cover the extra expense and annoyance you had with trucking.

Q. Was it your purpose, or did you intend, or expect such a charge would reduce truck deliveries? A. No, I don't think it was the intention.

Q. As far as you personally are concerned, did you ever have any understanding or agreement with your competitors concerning such a surcharge? A. No." (Tr. 34551)

Further,

"Q. Is it your opinion, Mr. Hogan, that any added expenses, if any, for the loading of trucks at your plants and the plants of your competitors equal exactly fifteen cents per barrel in all cases, whether loaded at your plants or loaded at the plants of your competitors? A. I don't know what it would be at our competitors. I would think at our plant it would not equal fifteen cents a barrel. That would probably be an arbitrary price.

What it would run one day, it wouldn't run the next. It may be high or low.

Q. Nevertheless, you placed fifteen cents per barrel loading charge. A. That is like everything else a competitor does in the cement industry.

Q. If the cost was eleven cents per barrel and you didn't put but eleven cents on to cover that, you would be ahead of your competitor? A. No. They probably would not have put on but eleven cents, either.

Q. You did it because your competitors did it? A. No, not exactly. We wanted to get compensated

for the nuisances and for the expenses of doing that job." (Tr. 34747-48)

Koch, Vice President of Lone Star, also denied agreement on this subject. (Tr. 33141)

COPLAY: J. F. Twamley, Vice President, testified on this subject as follows:

"Q. Did you for a time put in a special charge for truck loading?

• • • •

The Witness: I believe there was.

Q. To meet that condition that you just referred to? A. Yes, sir.

Q. What was the charge you put in? A. I am inclined to think that it varied. I think the maximum amount was 15 cents per barrel.

• • •

Q. What other mills in the Lehigh Valley also had an extra charge for loading to trucks during that period? A. I don't know.

Q. Do you mean to say that you would or could impose a charge, such a charge, without knowing whether your competitors did also?

• • •

The Witness: The probability is that we did not. I don't remember and I had no opportunity of ascertaining what our competitors were charging, but I would say as a general proposition that we must meet their competition or they must meet our competition.

By Mr. Wooden:

Q. In other words, if you had a fifteen-cent charge for truck loading, you infer that they must have had also? A. I think it probable. I do not infer that they must have had it also. I think, Mr. Wooden, that probably other mills were experiencing the same disadvantage with regard to handling

cement by trucks. I think it probable they all were equipped to handling carload loading economically.

Q. You do not believe that you could have put a fifteen-cent truck loading charge in effect unless the others did? A. I believe that we could not have put a fifteen-cent per barrel loading charge in effect unless our immediate neighbors did." (Tr. 6791-94)

MEDUSA: P. G. Dawson, Vice President, in his stipulated testimony, testified that:

"* * * Medusa adopted the practice of selling cement for truck delivery on a platform price which was 15 cents above the base which Medusa put on our York mill. This practice was established in order to compensate Medusa for the additional expense and trouble entailed as a result of truck delivery, to protect its good will with its regular dealer customers by selling to all of its dealers on the same truck price, and to protect a local dealer from the delivery of Medusa cement by truckers or distant dealers to the local dealer's regular market.

(126) The Medusa Company found that this special trucking price reduced to a great extent the criticisms with which it was confronted by its dealers and made it easy for it to maintain the good will with its customers. Medusa consequently adopted a similar practice at its other mills and silos." (Tr. 40071)

2. Districts 3, 4 and 5: 1930

The following is a list of companies and mills in Districts 3, 4 and 5 showing, in chronological order, the dates of adoption of a 15¢ (in one case a 20¢) differential and also the dates when it was dropped in so far as such dates appear in the record. Following this list is a list of companies and mills that did not adopt it.

(The citation in this list to Com. Ex. 1124 A-B is to a Lone Star memorandum dated July 28, 1930 from Pierson, Indianapolis office to Koch, New York

office listing f.o.b. car and f.o.b. truck prices at mills in 19 cities sent to the New York office July 26, 1930 and attaching a memorandum containing one correction. Com. Ex. 1124 C-D is a similar memorandum dated August 7, 1930 reporting two more prices picked up by salesmen in the field and adding two more names to the earlier list. Com. Ex. 1124 E-G is a similar memorandum dated September 4, 1930 giving corrected trucking prices found to be in effect in the territory and attaching a list dated August 15. While no exact dates of adoption are shown in these Lone Star memoranda, plainly the citations Com. Ex. 1124 A-B show truck prices reflecting a 15¢ differential reported from the field on or before July 26. Com. Ex. 1124 C-D shows the same on or before August 7 and Com. Ex. 1124 E, G shows the same on or before August 15. Asterisks in the Date column below reflect this situation.)

Company and Mill		Date Adopted	Date Dropped	Citation
Alpha	Ironton, Ohio	July 26, 1930*		Com. Ex. 1124 A, B; Tr. 23707.
	LaSalle, Ill.	July 26, 1930*		Com. Exs. 1124 A, B; 975-19 R.
Lehigh	Mitchell, Ind.	July 26, 1930*		Com. Ex. 1124 A, B.
Alpha	Bellevue, Mich.	July 30, 1930		Resp. Ex. 712.
Petoskey	Petoskey, Mich. (Lamson)	Aug. 1, 1930		Com. Ex. 3123 D.
Universal Atlas (See also below)	Buffington, Ind. (Gary)	Aug. 1, 1930	Mar. 13, 1931	Com. Exs. 975-14 J, 1124 A, B.
Castalia	Castalia, Ohio.	Aug. 7, 1930*		Com. Ex. 1124 C, D.
Peerless	Port Huron, Mich.	Aug. 7, 1930*		Com. Ex. 1124 C, D.
Aetna	Bay City, Mich.	Aug. 15, 1930*	Jan. 7, 1931*	Com. Ex. 1124 E, G, 2653.
	Fenton, Mich.	Aug. 15, 1930*	Jan. 7, 1931*	Com. Ex. 1124 E, G, 2653.
Green Bag W. Va.	Kenova, W. Va.	Aug. 15, 1930		Com. Ex. 1124 E, G.
Southwestern	Osborn, Ohio	Nov. 1, 1930	May 4, 1931	Com. Ex. 970-3 H, 2 V.
	Osborn, Ohio	Aug. 19, 1931		Resp. Ex. 3120 D.
Universal Atlas	Buffington, Ind.	Sept. 16, 1931		Com. Ex. 975-14 J.

Total Mills—24

* On or before this date.

Company and Mill		Date Adopted	Date Dropped	Citation
		20¢		
West Penn	West Winfield, Pa.	July 25, 1930	Jan. 1, 1931	Com. Exs. 3134 G, 1124 A, B, 970-4 A; Tr. 27796.
		15¢		
Medusa	Wampum, Pa. (Crescentdale)	July 26, 1930	Mar. 13, 1931	Com. Exs. 970-14 I, 3118 Y, 3134 Y, 1124 A, B; Tr. 40071.
	Bay Bridge, Ohio	July 26, 1930	Feb. 20, 1931	Com. Exs. 970-13 R, 14 F, 3118 X, 1124 A, B; Tr. 40071.
	Silica, Ohio (Toledo)	July 26, 1930	Jan. 28, 1931	Com. Exs. 970-14 W, 15 M, 3118 W, 1124 A, B; Tr. 40071.
	Newaygo, Mich.	July 26, 1930*		Com. Ex. 1124 A, B.
	Dixon, Ill.	July 26, 1930	Feb. 5, 1931	Com. Exs. 975-17 C, 1124 A, B; Tr. 40071.
	Manitowoc, Wis.	July 26, 1930*		Com. Ex. 1124 A, B.
Lehigh	New Castle, Pa.	July 26, 1930*		Com. Ex. 1124 A, B.
Bessemer	Bessemer, Pa. (Walford)	July 26, 1930*		Com. Ex. 1124 A, B.
Wabash	Osborn, Ohio	July 26, 1930*		Com. Ex. 1124 A, B.
Pittsburgh	Fultonham, Ohio (E. Fultonham, Zanesville)	July 26, 1930*		Com. Ex. 1124 A, B.
Superior	Superior, Ohio	July 26, 1930*		Com. Ex. 1124 A, B.

* On or before this date.

There is some slight conflict in the evidence as to adoption of the differential by Bessemer,[1] Pittsburgh[2] and Aetna[3] but in reliance on the Lone Star memoranda (Com. Ex. 1124 A-G) these conflicts have been resolved in favor of adoption.

Companies, mills and packing plants that did not adopt a differential.

Company	Mill and Packing Plant	Citation
Alpha	Manheim, W. Va.	Tr. 23705
Consolidated	Cement City, Mich.	No evidence
Diamond	Middle Branch, Ohio	No evidence
Ford	Dearborn (Fordson), Mich.	No evidence
Great Lakes	Cleveland, Ohio	No evidence
Green Bag, Pa.	Neville Island (Pittsburgh), Pa.	No evidence
Huron	Alpena, Mich.	Tr. 11366
	Wyandotte, Mich.	Tr. 11366
(packing plant)	(Detroit, Mich.	No evidence
" "	(Cleveland, Ohio	No evidence
" "	(Toledo, Ohio	No evidence
" "	(Muskegon, Mich.	No evidence
" "	(Saginaw, Mich.	No evidence

[1] F. B. Warren, Vice President, Bessemer, testified on direct that his company had never charged 15c. per barrel for delivery by truck (Tr. 32288). On cross, he testified that he did not intend this testimony to go back any farther than the time when his experience with the company began in August, 1936 (Tr. 32603-04).

[2] Letzkus, Sales Manager, Pittsburgh, testified on direct that he did not recall whether his company ever adopted a 15c. differential but he did not think they ever did (Tr. 37855).

[3] Calvin, President, Aetna, testified on direct that since he has been with Aetna (August 1, 1936—Tr. 29899) it has not charged any 15c. differential for loading trucks (Tr. 30137).

Company	Mill and Packing Plant	Citation
(packing plant)	(Milwaukee, Wisc.	No evidence
" "	(Green Bay, Wisc.	No evidence
Kosmos	Kosmosdale, Ky.	Tr. 36957
Lehigh*	Oglesby, Ill.	No evidence
Lone Star	Limedale (Greencastle), Ind.	Tr. 32857
Louisville	Speed, Ind.	No evidence
Marquette*	La Salle (Oglesby), Ill.	No evidence
Medusa	(Chicago, Ill.	No evidence
(packing plant)	(Milwaukee, Wis.	No evidence
	(Holland, Mich.	No evidence
Peerless	Detroit, Mich.	No evidence
Standard	Painesville, Ohio	No evidence
Standard Lime	Martinsburg, W. Va.	No evidence
Universal Atlas	Universal, Pa.	Tr. 35185
Wabash	Stroh, Ind.	No evidence
Wolverine	Quincy, Mich.)	Tr. 35919-20
	Coldwater, Mich.)	Tr. 35919-20

* did not truck.

Total mills and packing plants — 30.

Taking these two lists together they show that out of a total of 54 mills and packing plants in Districts 3, 4 and 5, 24 mills adopted a trucking differential and 30 mills and packing plants did not. Those mills that did, did so between July 25 and August 15, 1930 with one adopting later on November 1. Of those that did adopt, the record shows that eight dropped the differential during January, February and March of 1931 and one dropped it in May, 1931. The record is silent as to the others. Universal Atlas and Southwestern, after dropping the differential, readopted it on later dates.

A regular fall meeting of the Portland Cement Association was held in Chicago in November, 1929[4] and following the meeting F. H. Powell, President, Southwestern, wired C. C. Merrill, Southwestern, Los Angeles under date November 19 in part as follows:

[Italicized part quoted in Fdgs. Par. Eleven (c)]

"Very Quiet Meeting Light Attendance Establishing Trucking Basis Outlined Clugston Letter Does Not Have Support Important Mills Buffington Refuses Add Fifteen Cents To Mill Price For Truck Delivery Useless Attempt Change To New Basis Under These Conditions" (Com. Ex. 1270 A).

Clugston is identified as a one-time Southwestern sales manager.[5] The reference to Buffington is to Universal Atlas' Buffington, Ind. mill. This wire was sent some eight months before the first mill in Districts 3, 4 and 5 adopted a differential. There is no "Clugston Letter" in evidence and there is nothing further in the record as to the matter reported in this wire.

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[4] Com. Ex. 1203 VV: Letter dated 11/29/29, D. S. MacBride to Beckett, President of Riverside.

[5] Com. Ex. 1270 H-I: Letter dated 1/10/29, Jennings, former Manager (Osborn) Southwestern to Merrill, Vice President, Southwestern.

F. L. Stone, Vice President, Universal Atlas, had this to say about the history of trucking at Buffington and the adoption of a 15¢ differential at that mill:

"Q. Now, take your situation at Buffington and describe what you do with regard to trucking from Buffington. A. What we do now?

Q. Yes; and give a history of it, if you will, as briefly as you can, giving the points that might be important. A. Well, a brief history is that back in the late teens, or early '30's——

Q. Thirties? A. Or, I should say, '20's—the late teens or early '20's there was a switchmen strike, which seriously interfered with the movement by rail. Also, subsequent to that time, in the early '20's, there was a very, very great car shortage, and it was with great difficulty that we were able to move cement out of any of our plants, and it affected Buffington. We resorted to all sorts and kinds of things. We shipped cement in stock cars, with heavy paper lining; we shipped in open top cars, over which tarpaulins were put to protect the cement, and also by truck.

• • •

Q. Did you do the trucking, or did the customers? A. No; we never trucked from Buffington in trucks provided by ourselves, until comparatively recently, we began to do it into a county or two in the southern part of the State of Michigan.

Q. Generally speaking, all the trucking at that time was by customers calling in their trucks? A. That is right, and it has continued so, with one exception that I mentioned. The cement does not move by truck out of Buffington into the State of Indiana.

Q. Why is that? A. Largely and principally because the customers did not want it.

Q. Did it ever? A. It did; yes. It moves into Illinois, which means really Chicago only. Maybe some of it has gone elsewhere, and it is loaded on customers' trucks, that they send to the mill, and our price is 15 cents higher than the so-called price basing point.

Q. Has that always been true during the period of time that you have indicated? A. No; that has been comparatively recently. I mean by that, not prior to the beginning of the so-called depression.

Q. At one time, then, the price was what at Buffington? A. The price was the flat so-called price base at Buffington.

Q. And why did you put on the 15-cent differential which you have mentioned? A. Well, there were a number of reasons. We had always considered, even in times of that inability to make deliveries by railroad, that because of the additional expense, the nuisance, and so forth, we ought to make some sort of a charge. We did not do it at the time of car shortage and the switchmen's strike, because we thought that we ought not to, because it was not the customer's fault that we were not able to make deliveries; but, at any rate, we did not do it. As the depression came on, and the demand for cement dwindled, the competitors, hungry for business, came into Chicago, with offers to customers of prices lower than their previous prices. We found instances of that kind, and we thought they were doing it because they were unable to get in there in sufficient volume in these hard depression times against the trucking situation that related to our Buffington mill.

In carrying out our earlier thought that there should be a differential, we put a differential on, and when I say 'differential,' I think I described it a moment ago, so it is clear what it is. We put on a differential of 15 cents.

Q. Did you do that after consulting your competitors about it? A. No, no. We did this on our own hook. As I say, it was the continuation of an original idea that we had, that we really ought to charge more.

• • •

Q. And that differential is still in effect? A. That differential is on today; yes." (Tr. 35178-81)

A Universal Atlas inter-office memorandum from Hallock, Assistant Sales Manager, to Hoy, Sales Manager,

dated December 10, 1929 discusses trucking problems generally, comments on a report dated November 16 by Stone and contains the statement: "Practically all the opposition to cement trucking has arisen from selfishness; that is to say, from manufacturers who are not in a position to profit from this mode of transportation."[6] When this excerpt was read to Stone and he was asked whether he agreed with it, he testified:

> "A. I don't know that I would have used those words or expressed it that way, but I can suppose that you can say that any manufacturer is selfish when he wants a thing done or not done in a way that would make it easier for him than if it were vice versa.
>
> Q. Isn't it a fact that your company was in a position to benefit by trucking? A. A short answer to that is 'No.'
>
> Q. Didn't you locate your mills near large markets in order that you might have the advantage of cheap transportation to those large markets? A. I was not with the company when any of our mills were built except the Duluth mill, and I was not in a position at the time to have had any say with regard to that mill, and I really don't know what happened in connection with any one of our three mills. Of course, I can make a statement generally that it is obvious that one would like to be in as advantageous a location as possible, but different persons might disagree as to what that location might be in any particular instance." (Tr. 35266-67)

A Universal Atlas inter-office memorandum from Craig, District Sales Manager, Chicago, to Quebbeman, Sales Manager dated January 7, 1931 reports on the trucking situation in Indiana and Michigan and says in part:

> "Under present prevailing prices truck deliveries from competitive mills, tank or warehouse (with exception of certain mills so situated that no appreciable tonnage is involved) can not be competed with

[6] Com. Ex. 2647.

by us with car shipments. With mill prices f.o.b. trucks at majority of mills located outside of Detroit the same as the f.o.b. car destination prices less freight rate all jobs that come within an economical trucking radius of these mills, which in Michigan this year has been up to 70 miles, truck delivery has been made direct to job site at our f.o.b. car price at considerable savings to contractors.

Dealers find it economical to truck their warehouse requirements. It is possible for them to keep stocks low, get quick service, and requires a small initial investment. Practically all cement companies make trucking arrangements for the dealer and cement is unloaded directly into warehouse by the trucker. Our car shipments can not compete.

Assuming business conditions normal we estimate that we are losing approximately 250,000 barrels annually (that would move by car from Buffington) because of truck shipments from competitive mills.

There has been practically no business moving by truck since August 1 when our differential on truck shipments became effective and we do not feel that we are gaining any tonnage under present conditions because of truck shipments from Buffington.

We believe that we are losing some car business since trucking was curtailed or eliminated in the territory within the trucking range outside of the Calumet District. Since we put the 15¢ differential on trucking, tonnage has been lost to competitive mills who supply mortar in mixed cars with gray cement. Formerly we did not lose this business because trucking was sufficiently economical to control the gray business for Buffington. Also we are not gaining any business in other territories because of any change in the situations there. In markets like Detroit, Flint, Saginaw, Monroe and Jackson we have not had an opportunity to gain any tonnage by cars for the reason that competitors adjacent to those markets have not so far as we can learn put any differential on trucking. As previously reported public officials, contractors, and truckers in the Calumet District have vigorously protested our putting on this differential." (Com. Ex. 2653 C-D)

The previous report to which reference is made reads in part as follows:

> "The increase of $.15 a barrel on cement trucked from the mill has met with general approval by the large dealers in the Calumet District, but the small dealers, contractors and concrete products plants are absolutely opposed to it. * * *
>
> The large dealers in the Calumet District have been opposed to trucking for some time due to the fact that they have no heavy equipment for trucking cement and hire this work done by truckers in the District so have nothing to lose by trucking equipment being idle. * * * All of the contractors, smaller dealers and concrete products plants have purchased equipment for cement hauling and are very much opposed to our present policy." (Com. Ex. 2650)

On March 13 Universal Atlas dropped the differential at Buffington and before that date the record shows that six other companies had dropped the differential at their mills. See chronological list above.

Universal Atlas never adopted a differential at its Universal, Pennsylvania mill.[7]

On August 26, 1931 J. L. Eysmans, Vice President—Traffic, Pennsylvania Railroad, wrote to R. N. Collyer, Chairmar, Traffic Executive Association—Eastern Territory, relative to his conferences with cement shippers regarding trucking rates and he had this to say about Universal Atlas:

> "President B. F. Affleck, of this concern, was interviewed at Chicago on the 7th instant and corroborated the statements made by Messrs. Campbell, Holway and McFarland at the New York conference on July 22nd as to the injurious effect that trucking is having on the cement industry. Mr. Affleck stated that if there is any reasonable indication that the other manufacturers are willing to discontinue the use of trucks or put on a 15¢ differential in those

[7] Stone, Vice President, Universal Atlas (R) Tr. 35185.

instances in which trucks are used, his company is willing to cooperate." (Com. Ex. 1149)

Affleck, when asked to tell about this conversation, testified:

"A. Mr. Eyesman called—and I presume he called with the men mentioned here, although I don't remember them—and said that the—as I recall—that the railroads disliked to see the loss of traffic from the rails to trucks, and that he was there to induce us to discontinue trucking.

Q. What did you tell him? A. This letter from him to Mr. Collier says that I said that if other manufacturers were willing to discontinue the use of trucks, or put in a fifteen cent differential, I would be—I was willing to cooperate.

I am quite sure that Mr. Eyesman misquoted me there. There are locations where we have been loading cement on trucks right along, for many, many years, and it works right along, no trouble, and there would be no occasion for us to discontinue trucking at those points.

The other points where trouble was consistently rising, I think I did indicate to him if competitors discontinued trucking, and we found out about it, or if they put a fifteen cent differential on trucking and we found out about that, we would go along with that.

He quotes——

Q. Did you mean by that—— A. (Continuing) —Me as having said I would cooperate. I certainly didn't indicate I would enter into an agreement to do it. If I were entering into an agreement, I wouldn't need the instrumentality of Mr. Eyesman and whoever was with him to effect an agreement." (Tr. 34910-11)

The chronological list above shows that the 15¢ differential was reinstated at Buffington on September 16, 1931 after having been dropped at that mill on March 13, 1931. There is no evidence that any other mills took any action

on this subject at or about the time Universal Atlas reinstated a differential. Southwestern had reinstated a differential at its Osborn, Ohio mill on August 19th.

H. H. Lucas, Vice President, Petoskey, testified as to the adoption of a 15¢ differential at their mill in northern Michigan:

> "Q. Now, did you ever enter into any agreement with your competitors to charge this 15 cents? A. No.
>
> Q. And can you tell us why you adopted that practice? A. Yes. At that time there was some slight increase, and that business being picked up in very small lots on the part of dealers, and it was exceedingly small for the most part, because dealers up there consumed a limited amount within a given time, and it got to be quite a nuisance coming in there and interrupting the regular carloading, and we did not have the facilities to take care of them. We more or less devised that way of giving them an equitable price, allowing them to come and pick it up at the plant, and at the same time compensating us for the additional trouble and the expense we went to in connection with that type of handling.
>
> Trial Examiner Norwood: Now, when you added that 15 cents, that was an f.o.b. mill price, was it?
>
> The Witness: Your Honor, that was on this basis: Assume that the rail delivered price in Petoskey was $2.25, the rail rate was 25 cents, we arrived at that figure by taking the $2.25 price and deducting the rail rate of 25 cents to make it $2, and then added the 15 to that.
>
> Trial Examiner Norwood: I see.
>
> *By Mr. Withrow:*
>
> Q. So that under that hypothetical situation the dealer who came to your mill got it 10 cents cheaper? A. Correct, and had the advantage of picking up one bag or a thousand bags, whereas the other way he would have to take a minimum car.
>
> Q. Now, that applied to other dealers from other points than Petoskey, didn't it? A. Yes.

Q. And you continued to have this 15 cents up over the mill net for Petoskey? A. No, that was discontinued for a time. We have a modification of that, or a mill price at the present time. In some respects it works out about on the same basis, but it does not bear any relationship to a 15-cent charge, or to any rail rate involved. It is simply a price at the plant that we are willing to accept if anybody came to get it." (Tr. 38726-27)

Further:

"Q. Has your company made it a policy or practice to at all times allow dealers to send trucks to your mill and buy at a mill price without regard to where they wanted to take the cement? A. Yes. We haven't any trouble.

• • • •

Q. When you put on this 15 cents' additional charge for deliveries made to trucks at the mill, did that affect the volume of the trucking done in small lots? A. Not substantially, no.

Q. You did want to discourage it, didn't you? A. No. We wanted to compensate us for the extra expense we were being put to in connection with the loading of the trucks, and we were perfectly willing that the real small lots, such as a bag or two be taken but if they wanted to pick it up in larger quantities, why, we much preferred that.

Q. Is it your testimony that your policy with regard to trucking or the use of the 15-cent differential for truck orders had nothing to do with your desire or with any desire to have delivered prices remain stable? A. I do not think it was ever considered in connection with the delivered price.

Q. Did you ever know or learn in any way that the industry considered that a problem, the effect of trucking upon delivered prices?

• • • •

A. No, not in that way; I have known that the industry in certain sections was opposed to trucking; people in the industry that were opposed to trucking.

By Mr. Wooden:

Q. For that reason? A. No, but we have had trucking in Michigan as long as we have been in business." (Tr. 38822-26)

As to the southern Michigan and Ohio situation there is in evidence an announcement dated July 30, 1930 by Peerless to its sales department that effective on that date Peerless would use Silica and Baybridge, Ohio bases with a charge to trucks 15¢ higher than the charge to cars and that these prices would not be effective for Toledo. The announcement concludes with the following paragraph:

> "The arrangement under which competitive companies are increasing truck base as above will place you in a position to get business on an equal basis through delivery by cars at all points outside of a very limited radius from the plant." (Com. Ex. 2825)

In evidence also is a long discursive letter dated August 21, 1930 from Johnson, President, Aetna to Schmutz, Vice President, Bessemer, in which occurs the following statement:

> "The advancement of the cement by truck (which Mr. Rayder and Mr. McKelvey have acquiesced to, as I understand it) is good news and will help the situation. However, the unfortunate side of it is that the Detroit situation is not included in this arrangement, because Mr. Jones of the Huron Company will not acquiesce or agree to this condition. It has this effect on our Company—it forces the other mills in Michigan to meet our truck price in making deliveries on their carload price. In other words, as I understand it, carload price is 15¢ under trucking price." (Com. Ex. 1503 E)

Rader at this time was Vice President of Lehigh and McKelvey was Vice President of Alpha. The chronological list above shows that almost a month before this letter was written Lehigh had adopted a 15¢ differential at its New

Castle, Pennsylvania and Mitchell, Indiana mills and the other list above shows that it never adopted a differential at its Oglesby, Illinois mill. The same lists show that Alpha had adopted it at its Ironton, Ohio, Bellevue, Michigan and LaSalle, Illinois mills but never adopted it at its Manheim, West Virginia mill. Bessemer, the company to which the letter is addressed, and Aetna had adopted it on July 26 and August 15, 1930 respectively. The statement that Huron never adopted it is correct, as shown in the list above.

[There is evidence that trucking from the Wabash and Southwestern mills, both located in Osborn, Ohio, was the subject of discussion by representatives of those two companies at a meeting in Dayton, Ohio on July 22, 1931. A letter dated July 20, 1931 from the Secretary of the Ohio Builders Supply to a dealer in Cincinnati extends an invitation to this dealer and reads:

> "Wednesday, July 22nd, I have arranged a meeting with Harry Jennings of the Wabash Portland Cement Company and Bill Jennings of the Southwestern Portland Cement Company together with a committee of three or four Dayton and Springfield dealers.
>
> This meeting is for the purpose of discussing the trucking situation with the thought of either having them entirely close their plants to trucks or placing a differential on trucks loaded as against carload deliveries.
>
> I imagine this is the first time these two fellows have gotten together for some time and I thought that you might be interested in being present. For while they have not as yet started to truck into your market the trend of the times make one wonder when such a thing might occur." (Com. Ex. 1043 Z)]

There is no evidence to show whether this meeting was held or what took place at it, if it was held. The chronological list above shows that Southwestern readopted a 15¢ differential at its Osborn mill on August 19, 1931 after

having dropped it on May 4, 1931. Wabash is shown to have adopted it at its Osborn mill on July 26, 1930 and there is no evidence as to when it was dropped. There is a suggestion in a Medusa salesman's report dated August 25, 1931 that Wabash may have reestablished the differential at about this time.[8]

In an interview with a railroad representative in September 1931 W. J. Jennings, General Manager of Southwestern's Osborn Mill, was reported to have said that "they were endeavoring to discourage their dealers specifying truck service, and in order to bring this about, they are adding 15¢ per barrel on movements via truck over their prices for shipments via rail".[9]

3. Other Districts

District No. 6: Of the nineteen mills in this District only the two Penn Dixie mills adopted a 15¢ differential, as follows: at Richard City, Tenn. it was adopted on May 14, 1931 and dropped on June 2, 1932 and at the Clinchfield, Ga. mill it was adopted on May 15, 1931 and dropped on August 2, 1932.[1]

Koch, Vice President, Lone Star testified that his company charged 6¢ above the mill base at Norfolk (South Norfolk), Va.[2] but his testimony does not show date of adoption or length of time this was in effect.

District No. 7: Of the twelve mills in this District, only two had any surcharge for delivery to trucks at the mill. The non-respondent South Dakota State Cement Plant at Rapid City, S. D. has always charged extra for loading trucks and since July, 1937 the charge has been 25¢. It has

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[8] Resp. Ex. 3120-D.

[9] Com. Ex. 1153: Letter dated September 23, 1931.

[1] Com. Ex. 975-8 H-9 o; (R) Tr. 38151.

[2] (R) Tr. 33141.

found that loading trucks is more expensive than loading railroad cars.[3]

Alpha answered the Burns-Clark questionnaire for its St. Louis, Mo. mill as follows: "Part of the time we used our regular mill base, other times 15¢ above mill base."[4]

District No. 8: Of the thirteen mills in this District, seven adopted a 15¢ differential, as follows:

		Date Adopted	Citation
Monarch:	Humboldt, Kan.	June 24, 1932	Com. Ex. 976-8 K
Ash Grove:	Louisville, Neb.	no date shown	Com. Ex. 976-7 P
	Chanute, Kan.	July 24, 1932	Com. Exs. 971-14 Z, 976-6 W, 6 X
Nebraska:	Superior, Neb.	August, 1932	Com. Ex. 976-4 K, Tr. 42045
Consolidated:	Fredonia, Kan.	Aug. 2, 1932	Com. Ex. 976-5 J
	Mildred, Kan.	no date shown	Com. Ex. 976-6 D
Lone Star:	Bonner Springs, Kan.	no date shown	Tr. 32857-58, 33141

Brooke, Vice President of Monarch, testified that the 15¢ service charge for loading trucks was imposed partially in an attempt to discourage trucking and partially to offset the additional expense. He guessed that it cost "considerably more" than 15¢ additional to load a truck.[5] He added: "We found that our competitors on the north

[3] (R) Tr. 41535-36, 41592.

[4] Com. Ex. 975-4 B.

[5] (R) Tr. 42375.

were making a charge, and it appealed to us as a good thing, so we adopted it."[6]

Hoenig, Sales Manager of Nebraska, testified that Nebraska imposed a 15¢ charge "to take care of what we regarded as miscellaneous extra costs and inconvenience, etc., and labor costs, and other details."[7] It was first adopted "probably in the same manner that we adopted practically everything in the way of a new policy, or new prices, and that was by finding that it had already been established satisfactorily in the territory by competition. I say 'probably'—that is the way we did it."[8]

District No. 9: Of the nine mills (including two mills of non-respondents) in this District, the evidence shows that only the El Paso, Texas mill of Southwestern ever imposed any surcharge for delivery to dealers trucks at the mill. A surcharge of 25¢ per barrel was announced effective February 1, 1936 "to take care of additional costs of handling."[9] This was later reduced to either 10 or 15 cents.[10]

W. R. Blair, Sales Manager at the El Paso mill testified as follows:

> "Q. Now, you have testified, Mr. Blair, that you have discouraged the loading of, or selling of cement for loading to dealers' trucks at your mill. A. Yes, sir.
>
> Q. How have you discouraged it? A. We have told them that we did not want any more of that business than was absolutely necessary; some of them we have refused to load. We have tried to add premiums, we tried to accommodate some of them;

[6] (R) Tr. 42376.

[7] (R) Tr. 42045.

[8] (R) Tr. 42046.

[9] Resp. Ex. 2970.

[10] (R) Tr. 38914.

we have to do it in certain territories to meet competition, but in every way we try to limit the amount that we ship by truck until we have—we feel that there is enough business in the territory to justify us equipping our plant for truck loading." (Tr. 39339)

He denied any agreement with competitors as to the surcharge.[11]

District No. 10: Of the eight mills (including one mill of a non-respondent) in this District, the evidence shows that at the two mills of Colorado (at Portland and Boettcher, Colo.) "a penalty of 10¢ per barrel was established against shipments via buyer's truck to cover additional cost handling less than carload sales."[12]

G. Price Policies: NRA Code Price Filing.

NRA Code provisions for open price filing and the activities of the Code Authority in connection therewith are set forth in Part III, pp. 617 to 691, *infra*. This evidence shows that the language of the Code placed no restrictions upon the types of prices that could be filed (pp. 617-618, *infra*) and that the Code Authority accepted any price provided it was sufficiently definite in its terms and conditions to furnish competitors, the trade and the buying public with accurate information (pp. 645-657, *infra*).

[The Code Authority at an early date took the position that truck prices, like other prices, must be filed. In response to an inquiry by Pittsburgh, Reiter, Chairman of the Code Authority, said that the matter had been discussed at a Code Authority meeting on January 10, 1934 and that "It was the thought of the Code Authority mem-

[11] (R) Tr. 38915.

[12] Com. Ex. 967-11 R, 13 L.

bers that if prices and all terms and conditions governing truck sale of cement were filed with the Code Authority by a member of the Industry and followed strictly by him, that such sales were in exact compliance with the Code.'']¹

[Minutes of a Code Authority meeting April 10, 11 and 12, 1934 read in part as follows:

> "The Chairman read a letter from a member of the Industry, calling attention to the general evils of trucking. It was the sense of the meeting that reply should be made to this member of the Industry that if prices, terms and conditions were filed with the Code Authority covering truck delivery, the member who had so filed was in entire compliance with the Code, providing that he later sold under such prices, terms and conditions." (Com. Ex. 628 B)]²

[On at least two occasions the Code Authority insisted that sales at truck prices that had not been filed were in violation of the Code. One such instance is shown in a letter dated June 21, 1934 from the Code Authority to Aetna, Peerless and Wolverine advising them that the Code Authority was informed that these companies were making truck deliveries in Michigan without having filed conditions for such sales.³ Further correspondence with Aetna and Wolverine on this subject is in evidence.⁴ As to this Reiter testified "After considerable effort we got a

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¹ Com. Ex. 1006 A.

² See also Com. Ex. 1006 D: Letter dated March 19, 1934, Lucas (Petoskey) to Code Authority, and
Com. Ex. 1006 E: Letter dated March 21, 1934 in reply. Lucas testified that this was the last he heard of the matter (Tr. 38722-23);
Com. Ex. 1011: Letter dated April 18, 1934, Reiter to Dewey.

³ Com. Ex. 1008 A.

⁴ Com. Ex. 1008 B-G.
Resp. Ex. 2636 D-H.

filing which we considered to be sufficiently specific for our needs, as that correspondence indicates"[5] and said "I doubt if that is a complete file of the correspondence which passed."[6] The other instance is a complaint filed against Calaveras and Cowell charging them with permitting trucking from their mills without having filed provision for this with the Code Authority.][7]

[The Code Authority received and filed all truck prices provided they were definite enough for competitors to meet them. Reiter testified that the Code Authority "made no criticisms of any filing which was sufficiently definite for competitors to meet and which did not violate any other provisions of the code."[8] He was asked what he meant by "filing truck conditions" and testified:

> "Some of these terms which affect the price by trucks would be the size of the minimum truck load, whether or not delivery was made to the job site, or only to dealer's warehouses, and, of course, the definitions covered by such a filing, or the area covered by such a filing, should be specifically stated, as well as any added service provided for truck delivery which would affect the price filed by the member of the industry." (Tr. 17030)]

[In evidence are a number of truck prices and conditions filed by different producers at different times and for different territories.[9] Reiter also was asked to name from

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[5] (C) Tr. 4160.

[6] (C) Tr. 4161.

[7] Com. Ex. 1009 A-D.

[8] (C) Tr. 17003.

[9] Com. Ex. 1006 C: Huron filing dated March 20, 1934 for Milwaukee.
Com. Ex. 1006 F: Universal Atlas filing dated May 24, 1934 for its Muskegon, Mich. warehouse.
Resp. Ex. 2636 C: Filing dated May 25, 1934 for Muskegon, Mich. warehouse.

memory the areas for which truck prices were and were not filed. He said "Mr. Wooden, this is a difficult assignment, because the areas where there were no trucking conditions filed are quite large. And even the areas where they were filed are considerable in number, and I am afraid it is beyond my memory"[10] and Commission counsel said "I don't expect you to be exhaustive about it."[11] He recalled that truck prices were filed for Michigan, Toledo, Cleveland, Buffalo, California, Florida from Miami north along the Atlantic seaboard, Chicago and Buffington, Ind., Milwaukee, Green Bay, Duluth, Montana, Cape Girardeau, Mo. and El Paso, Texas. He did not recall any truck prices filed for Texas (except El Paso), the southeast (except Florida), the Lehigh Valley, Hudson Valley, western Pennsylvania, central and southern Ohio, Indiana, Iowa, Kansas, Nebraska, Oklahoma, Arkansas, Missouri (except

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Resp. Ex. 2636 J-N: Code Authority to Industry dated Aug. 3, 1934 circulating all truck prices filed for lower Michigan, Wisconsin and upper Michigan, Ohio, Indiana and Chicago, Ill.

Resp. Ex. 2636 o: Code Authority to Industry dated Aug. 6, 1934 showing changes filed for Toledo.

Resp. Ex. 2636 P: Same for Buffington, Ind.

Resp. Ex. 2636 Q: Same dated Aug. 16, 1934 for Lucas County, Ohio and upper Michigan points.

Resp. Ex. 2636 R: Same dated Aug. 24, 1934 for upper Michigan.

Resp. Ex. 2636 S: Same dated Nov. 3, 1934 for upper Michigan.

Resp. Exs. 2636 V-Z4; 2414 B-F: Same dated Dec. 6 and 15, 1934 for Cleveland and Toledo, Ohio and for Michigan.

Resp. Ex. 2143: Federal filing dated March 4, 1935 for Erie and Niagara Counties, N. Y.

Resp. Ex. 2515: Universal Atlas filing dated March 19, 1935 for 11 Wisconsin Counties around Milwaukee.

Com. Ex. 1008 I: Aetna filing dated May 9, 1935 for nine counties in Wisconsin.

Com. Ex. 1010: Filing dated Sept. 19, 1935 with Trade Practice Committee for Oswego, N. Y.

[10] (C) Tr. 4131-32.

[11] (C) Tr. 4132.

Cape Girardeau), the mountain states and the Pacific Northwest (Washington, Oregon and Idaho).][12]

[On a few occasions the Code Authority rejected filings because of indefiniteness. The following points of indefiniteness are shown in the record:

(a) Failure to state the territory in which trucking conditions applied and the applicable prices and terms within that territory.[13]

(b) Failure to state minimum truck load.[14]

(c) Failure to state whether loaded trailer is left on job for buyer's convenience or for storage purposes.[15]

(d) Failure to state who was to unload trucks.[16]

(e) Failure to state whether delivery is to warehouse or job site.][17]

[In response to an inquiry from Dr. Arthur R. Burns in April, 1935 (during the Code period) Reiter had this to say about filing of truck prices and conditions:

> "Truck prices may be filed with the Code Authority either f.o.b. truck at Member's mill or warehouse or f.o.b. destination, and both types are filed with us. Considerable areas in the United States are covered

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[12] (C) Tr. 4129-35.

[13] Reiter, Chairman Code Authority (C) Tr. 4158-59.

[14] Resp. Ex. 2142: Letter dated Feb. 27, 1935, Reiter to Federal.
Resp. Ex. 2143: Letter dated March 4, 1935, Federal to Code Authority in reply.

[15] Id., Com. Ex. 1008 H; Resp. Ex. 2636 U: Letter dated Nov. 28, 1934, Reiter to members of Industry.
Resp. Ex. 2636 V: Letter dated Dec. 6, 1936, Reiter to Wolverine.

[16] Resp. Ex. 2142: Letter dated Feb. 27, 1935, Reiter to Federal.
Resp. Ex. 2143: Letter dated March 4, 1935, Federal to Code Authority in reply.
Resp. Ex. 2636 V: Letter dated Dec. 6, 1934, Reiter to Wolverine.

[17] Id.

with us by truck filing. I should say that it was infrequent where prices are filed with us f.o.b. customer's truck at Member's mill or warehouse to restrict the territory to which deliveries may be made. I should likewise say that in general where truck prices are filed f.o.b. trucks at destination that such prices f.o.b. dealer's warehouse or job site are usually the same as the carload price f.o.b. that destination." (Com. Ex. 277 L)].

[In his testimony Reiter said that the filing of truck prices and conditions was handled in the same way as the filing of rail prices.][18]

Evidence as to the price policies shown by the truck filings during the Code period is not digested here. See Part VI E, *supra*, pp. 1450 to 1485.

H. Dealer, Railroad & Producer Activities in Connection with Trucking: 1931.

1. The July 22, 1931 Meeting in New York

In the spring of 1931 MacFarland, Medusa Vice President and at that time President of the Institute, made a business call on Holway, a Medusa dealer at Youngstown, Ohio. Holway was also chairman of the Cement Committee of the Ohio Builders' Supply Association[1] and was later Vice President of the National Builders' Supply Association.[2] Holway suggested that MacFarland join with dealers in approaching railroads to seek the solution of the trucking problem.[3] Holway contacted Campbell, President of the National Builders' Supply Association, whose office

[18] (C) Tr. 4154-55.

[1] Com. Ex. 1043 G, L.

[2] Com. Ex. 1043-4 S.

[3] MacFarland, Vice President, Medusa (R) Tr. 30979-80.

was located in Wilmington, Pa., near Youngstown, Ohio.[4] As early as January 1931, Campbell had sent a circular letter to several eastern railroads declaring his opposition to trucking and warning them that a trucking company was attempting to induce cement and sewer pipe manufacturers to make all deliveries by trucks.[5]

On June 12, 1931, Campbell wrote MacFarland as follows:

> "Mr. Holway has just called and explained to me the major content of your recent conversations with him. The thought he has brought to the light is vital and I feel it should be followed through.
>
> If Mr. Atterbury would join us on this matter and later interest all manufacturers and railroads in the evils of trucking it would be a strong move toward bettering conditions in the construction field." (Com. Ex. 1489)

This was the first letter MacFarland received from Campbell.[6] On the same day Campbell also wrote W. W. Atterbury, President of the Pennsylvania Railroad, as follows:

> "Would you be interested in a movement on the part of building material dealers to induce manufacturers of cement and other building materials to stop trucking from their plants and ship everything by rail?
>
> Would you attend in person a conference of manufacturers and dealers on this very subject?
>
> Some manufacturers are in favor of this move. Most of the dealers are. If this thing can be accomplished it will reclaim millions of tons of freight for the railroads that are now being transported to warehouses and jobs by truck.
>
> Awaiting the expression of your reaction on this matter." (Com. Ex. 1356)

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[4] MacFarland, Vice President, Medusa (R) Tr. 30977-78.

[5] Com. Ex. 1043 A.

[6] MacFarland, *supra*, Tr. 30983.

In response to Campbell's letter, Eysmans, Pennsylvania Railroad Vice President, telephoned Campbell and informed him that Atterbury looked favorably upon Campbell's proposal. As a substitute for Atterbury, Eysmans offered to attend the proposed conference, and added in a letter to Campbell:

> "As outlined in our talk it would be very desirable that our meeting be kept strictly confidential and for that reason it would seem desirable to hold it in New York.
>
> General Atterbury thinks it is very important that in arranging for this meet you should include Messrs. Daniel Willard, President, B. & O., Baltimore; P. J. Crowley, President, N.Y.C. Lines, New York, and J. J. Bernet, President, C. & O., Cleveland." (Com. Ex. 1481)

Campbell followed the suggestion made by Eysmans and invited the railroad executives named above to attend a conference in New York.[7]

In a letter to Willard, President B. & O. R.R., Campbell said that he had talked with "leading officials of the cement industry" and that "they are anxious for the conference".[8] When questioned about this Campbell testified:

> "* * * as president of the National Builders' Supply Association, I was in New York every few weeks, and was talking with all the cement companies, with twelve of them; they wouldn't be on this or wouldn't be on the other, and to specify what ones, I can't do

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[7] Com. Ex. 1043 Q: Letter dated June 20, 1931, Campbell to Bernet (C & O).
Com. Ex. 1483 (1043 S): Letter dated June 26, 1931, Bernet to Campbell.
Com. Ex. 1482: Letter dated June 20, 1931, Campbell to Crowley (NYC).
Com. Ex. 1043 R: Letter dated June 23, 1931, Willard (B & O) to Campbell.

[8] Com. Ex. 1486 A: Letter dated July 1, 1931.

it, so that's the reason I say, because I was in Mr. Blain Smith's office quite often,—I was in the International with Mr. Koch, and some other men, in the Lehigh with Bert Swett, and other people, and I was up in the other cement companies, and their offices, and when you are in there every month talking with them it is pretty hard to recall just what or who you talked with on that one thing, and that's the reason I can't remember." (Tr. 10949)

July 22, 1931 was the date finally set for the proposed meeting.[9] In addition to the railroad executives and the dealers (Campbell and Holway), MacFarland was invited to present the manufacturers' angle and he was the only manufacturer present.[10] On this point Campbell testified that:

"A. We asked Mr. MacFarland to come as representing the Cement Institute.

Q. Was he at that time vice president of the Medusa Company? A. I could not tell you that. I think he was, but I could not say positively.

Q. Are you positive Mr. MacFarland attended the meeting as a representative of the Institute rather than his own company? A. Yes, sir.

Q. Did the invitation invite him as—— A. (Interposing) As president of the Cement Institute, not the Medusa." (Tr. 4568; see also Tr. 10961; 10973)

[9] Com. Ex. 1359: Letter dated 7/18/31, Campbell to Eysmans, Vice President, Pennsylvania RR.
Com. Ex. 1343: Letter dated 7/8/31, Campbell to Eysmans.
Com. Ex. 1472: Letter dated 7/9/31, Campbell to MacFarland, Vice President, Medusa.
Com. Ex. 1473: Telegram, Campbell to four railroad officials and MacFarland.

[10] Com. Ex. 1470: Letter dated 7/18/31, Campbell to MacFarland, Vice President, Medusa.
Com. Ex. 1472: Letter dated 7/9/31, Campbell to MacFarland, Vice President, Medusa.
Com. Ex. 1479: Letter dated 7/2/31, Campbell to MacFarland, Medusa.

On this same point MacFarland testified as follows:

"Q. Mr. MacFarland, in any of your dealings with Mr. Campbell or Mr. Holway, would you tell us whether or not you were acting as president of The Cement Institute? A. I was not.

Q. In what capacity were you acting? A. As vice president of the Medusa Cement Company." (Tr. 30982)

And further:

"Q. Were any other cement manufacturers present? A. There were not.

Q. Did you make any suggestion that other cement manufacturers be asked to be present? A. I did not. I would not have been there if they had been.

Q. And why didn't you ask to have other cement manufacturers present? A. I was trying to work out in the interest of my own company.

Q. At the time you went to the meeting would you tell us whether or not you then knew that you were to be the only cement manufacturer present? A. That was my understanding, otherwise I would not have been there." (Tr. 30988)

And further:

"Q. Well, Mr. MacFarland, before attending the meeting, would you tell us what you understood your position was to be at the meeting? A. Yes, I discussed the question with both Holway and Campbell at different talks I had with them, and told them that I felt that with the trucking situation as it was, being on an unsound basis, the railroads could get in and practically meet that unsound situation if they would be willing to reduce their rates for short-haul distances and increase their minimum carloadings.

Q. Well, in taking this position, will you tell us whether or not you were representing all the manufacturers or only the Medusa Company? A. I was only representing the Medusa Company." (Tr. 30990-91)

And as to his relations with Campbell:

> "Q. Did he look upon you in the light that you were president of The Cement Institute? A. He did not.
>
> Q. You are positive of that, are you? A. So far as I know. I never acted with him or never worked with him as president of The Cement Institute." (Tr. 31068)

Evidence is digested in Part X showing that during the period from May, 1931 to June, 1933 Institute membership was at its lowest point with 24 members, its only activity was the freight rate service, and no meetings of members or of trustees were held, see pp. 1808 to 1812, *infra.*

The purpose of the meeting, as revealed in the invitations to railroad executives and in the invitation to MacFarland, was to enable representatives of dealers and railroad executives to devise a course of action which would induce cement manufacturers to eliminate trucking and thus restore this traffic to the rails.[11] On the witness stand, however, Campbell stated that the purpose was "to see if

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[11] Com. Ex. 1356: Letter dated 6/12/31, Campbell to Atterbury, President, Pennsylvania R.R.; Eysmans, Vice President, Penn. R.R. (C) Tr. 4604-05.
Com. Ex. 1043 Q: Letter dated 6/20/31, Campbell to Bernet, President, C. & O.
Com. Ex. 1043 R: Letter dated 6/23/31, Willard, President, B. & O.R.R. to Campbell.
Com. Ex. 1481: Letter dated 6/17/31, Eysmans, Vice President, Penn. R.R. to Campbell.
Com. Ex. 1482: Letter dated 6/20/31, Campbell to Crowley, President, New York Central R.R.
Com. Ex. 1470: Letter dated 7/18/31, Campbell to MacFarland, Vice President, Medusa.
Com. Ex. 1472: Letter dated 7/9/31, Campbell to MacFarland, Vice President, Medusa.
Com. Ex. 1479: Letter dated 7/2/31, Campbell to MacFarland, Vice President, Medusa.

anything could be done to regulate the delivery of cement to any given point" by railroad.[12]

Further:

> "Q. Was the transportation of cement by means other than by railroads discussed at the two meetings? A. Not discussed as against any means of transportation, but as stabilizing the cement delivery to any given point." (Tr. 4553)
>
> Q. What prompted you to call the meeting for discussion of the problem of transportation of cement, Mr. Campbell? A. Lack of any basic price on the commodity at any given point.
>
> Q. That is, delivery points? A. Delivery points.
>
> Q. And what had led to the lack of any certainty as to the delivered prices? (Tr. 4555)
>
> • • •
>
> Mr. Hershberger: Your answer refers to the entire country?
>
> The Witness: Yes, sir. As far as was reported to us. I think all of the States and all of the territories, trade areas, and so forth, were equally affected, by the conditions that existed, and we were trying to stabilize the market so that we would know, as dealers, where we stood, where we were and how we could quote.
>
> *By Mr. MacIntyre:*
>
> Q. What led to the lack of stability of which you have spoken? A. Deliveries, that is, quoted deliveries far below the possible price at which said deliveries could be made.
>
> Q. In other words, there were varying prices at one delivery point for the same commodity? A. Yes, sir." (Tr. 4555-56)

A memorandum of the meeting prepared by the secretary of the Traffic Executive Committee of the Trunk Line Association[13] reads as follows:

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[12] (C) Tr. 4553.

[13] Gottschalk (C) Tr. 4616-17.

"Memorandum of Conference of Trunk Line Traffic Executives, New York,

July 22, 1931.

1. TRUCKING RATES ON BUILDING MATERIAL. (813)

(Mr. W. W. Campbell, Pres.,
National Building Material Dealers Assn.

Mr. E. J. Holway,
Youngstown Ice Company.

Mr. D. H. MacFarland,
Medusa Portland Cement Co.

were present during the discussion of this subject.)

On behalf of the National Building Material Dealers Association the suggestion had been offered that a conference be arranged between the representatives of that Association and carrier Executives to consider the demoralized situation with which industry is confronted by reason of inability to make firm price quotations by producers at various points where relationships have been based on known freight rate factors, because of the extreme uncertainty and fluctuation in the charges of trucking agencies for the transportation of Cement, Lime, Plaster, Brick, and other building material.

By reason of the fact that Cement is largely employed as a criterion in the consideration of building material prices, transportation service, etc., the discussion centered largely around the movement of Cement, although the same general practice obtains with respect to Lime and other building materials.

It was stated to be the trade custom that the price set by the nearest dealer is generally equalized by more distant competitive shippers who absorb the difference in freight charges, with consequent lower net price for the farther distant producer. It was pointed out that in connection with rail movements shippers are in position to secure definite and accurate information as to the freight charges applicable enabling them to bid accordingly and to determine whether they are in position to meet the price quotation currently offered.

During the period of heavy demand, Cement shippers had declined to make deliveries to truck at the FOB Factory price, making an additional charge for truck deliveries and thereby encouraging the movement to the rail carriers.

With the advent of distressed economic conditions this restriction was removed, with resulting uncertainty as to the charges being assessed by truckmen for transportation from factory, warehouse, or silo, to point delivery on the job, and the uncertainty as to transportation charges had brought about a lowering of prices to the point where profit to the manufacturer and profit to the dealer had been wiped out.

Attention was directed by representatives of the Building Material Dealers Association to an apparent lack of coordination as between railroad departments in the purchasing of building materials which had resulted in truck movement of such materials, even in connection with railroad improvements.

The cooperation of the railroads was requested in an endeavor to prevail upon manufacturers and dealers generally to use the rail service with its stabilized rate structure and certainty of transportation rather than the truck service with its price fluctuations and uncertain operating conditions.

Following the adjournment of the conference with representatives of the building material industry, arrangements were made for individual conferences by directly interested roads with Cement manufacturers located on their respective lines based on the discussion at this meeting." (Com. Ex. 1043 AA)

Referring to the paragraph beginning "It was stated", MacFarland testified he could not recall any statements of that kind having been made at the meeting.[14] Referring to the paragraph beginning "The cooperation of the railroads was requested," he testified that he did not make

[14] (R) Tr. 30992-93.

such a request nor did he recall such a request being made at the conference while he was present.[15]

When asked what he did in the way of making statements at the meeting, MacFarland testified:

> "My only recollection of the statements in that meeting is that I told the railroads—the railroad people there—that I felt that if they would reduce their short-haul rates up to a distance of about fifty or sixty miles, increase their minimum loading, they could get back considerable business that they had lost." (Tr. 31065)

Campbell testified that the "dealers" at the meeting (Campbell and Holway) merely stated the disadvantages of trucking to them as an industry and requested that something be done to make the market stable. Campbell said "they" (Campbell and Holway) suggested that the cement industry close their plants to trucking of cement.[16]

Eysmans' testimony as to the principal subject discussed at the meeting is as follows:

> "Well, it was the general plight of the industry, and by that I mean the men in the supply business were having apparently a considerable lot of difficulty in transacting their business because the trucks had crept into it in such a way that there was no stability as to what prices were, and a great deal of havoc apparently going on. Now, I can not just differentiate in my own mind as to whether some of these things I am going to say were actually brought out at that meeting or whether it was my own knowledge of the situation that we had discovered ourselves over a period of years, but the supply men complained at that particular meeting, however, that the business had practically gone haywire because of the entrance of the trucks. (Tr. 4597-98)

[15] (R) Tr. 30993, 30995-96, 30998.

[16] (C) Tr. 4587.

Q. What caused it to go haywire because of the trucks? A. Well, these truck operations meant that the operators of the trucks were going to the cement plants and taking cement direct to the jobs, nobody knew what they were charging. Some of these fellows that were in the business, and this is a point that I am not clear whether it was discussed there or whether it was my own knowledge of the situation, were what we call fly-by-night truck operators. It was about the beginning of the depression, and men who had lost their jobs, mechanics we will say, maybe two mechanics, would join together and buy up a second-hand truck on an installment basis, were able to repair it and keep it in repair fairly well, and they would go in the trucking business, and what charges they were making were whatever they could get, whatever the traffic would bear, I suppose they meant by that. In some cases it was one rate, in some cases it was another, in some cases these truck operators were, you might say, dealers themselves, men that were not keeping books as to what this thing was costing them, and making any price that they could get for the delivery of cement. (Tr. 4598)

* * *

Mr. Campbell was the spokesman, and there was one other gentleman that I am sure was in the supply business—I don't recall his name—that spoke. If there were any manufacturers there, they did not impress me that they were making any point on this situation at all. I think they were there pretty much as we were, listening to what was to be said. I mean it was all discussion of the supply people. I don't recall their difficulties. There was nobody got up there as a manufacturer, a cement manufacturer and described that he had any difficulties that were being covered along the line that Mr. Campbell had developed at the meeting." (Tr. 4603-04)

Brister (New York Central R.R. executive) testified in response to a question as to whether there were any agreements or understandings at the meeting:

"It was stated, after statements were made by those who addressed the meeting and whose names I don't recall now, that by consultation with various cement companies, there might be an opportunity for the railroads to get the business back to the rails, and continue it on the rails. The territory I think was divided up, that is, the territory east of Chicago, North of the Ohio and Potomac Rivers. Various railroads in given territories, I think agreed to consult with cement shippers for no other purpose whatever than to discuss with them the possibility of getting the business back on the rails." (Tr. 7331-32)

Campbell testified that after the meeting MacFarland "took it up with the Cement Institute, as I understand it, himself." (Tr. 4587)

Campbell added:

"• • • We presented to Mr. McFarland what we thought might be a remedy.

Q. And what was that? A. And what the Cement Institute did after that, it did on its own volition.

Q. What was your suggestion? A. That it close its plant to the trucking of cement." (Tr. 4587)

On this point MacFarland testified as follows:

"Q. Now, during this interim between July, 1931, and January, 1932, these two conferences, had you made any efforts whatsoever to interest any other cement manufacturers in this matter? A. No, I had not.

Q. You have already testified that there were no meetings of the Institute during this period. Would you tell me, now, whether or not you made any oral or written reports to any of the members of the Institute about these negotiations or conferences you had with Mr. Campbell and the railroads? A. None whatever." (Tr. 31023)

2. Railroad-Producer Interviews Subsequent to 7/22/31 Meeting

It was determined at the meeting that the interested railroads should interview selected cement producers to induce them to discontinue trucking. Collyer, Chairman of the Traffic Executive Committee of the Trunk Line Association, addressed the railroads as follows:

> "Referring to memorandum of conference of Trunk Line Traffic Executives with representatives of the National Building Material Dealers Association on July 22 at which time the building material dealers set forth the demoralized situation with which industry is confronted by reason of inability to make firm price quotations at points where relationships have been based on known freight rate factors, this condition having arisen because of the extreme uncertainty and fluctuation in the charges of trucking companies for the transportation of Cement, Lime, Plaster, Brick and other building material:
>
> It will be recalled that following an extended discussion and later consideration by the Traffic Executives it was understood that the Traffic Executives of interested roads would confer with cement manufacturers located on their respective lines, based on such discussion, in the endeavor to interest them in standardizing the use of rail service with its stabilized rate structure and known transportation conditions, rather than trucking service with its price fluctuations and uncertain operating conditions.
>
> It was understood that these conferences would be arranged for by roads as follows:

Pennsylvania R.R.	The Universal Atlas Cement Co. Mr. B. F. Affleck, President, Chicago, Ill.
Lehigh Valley R.R. Central R.R. of N. J. Reading Company	The Lehigh Portland Cement Co. Col. E. M. Young, Allentown, Pa.
	The International Portland Cement Company

	Mr. H. Struckman, President, New York.
Central R.R. of N. J.) D.L. & W. R.R.)	The Alpha Portland Cement Co.
	Mr. F. M. Coogan, Easton, Pa. or New York.
N. Y. C. & St. L. R.R. ...	The Medusa Portland Cement Co.
	Mr. D. H. MacFarland, Cleveland, Ohio.
Lehigh Valley R.R.	The Pennsylvania Dixie Portland Cement Company
	Mr. Blaine S. Smith, President, New York.
New York Central Lines	The Huron Portland Cement Co.
	Mr. J. B. Ford, President, Detroit, Mich.
Pennsylvania R.R.) New York Central Lines)	Bessemer Portland Cement Co.
	Mr. Charles Schmutz Vice-Pres. Youngston, O.
New York Central Lines) Pennsylvania R.R.)	The Green Bag Cement Company
	Mr. A. P. Meyer, Secretary Pittsburgh, Pa.
D. L. & W. R.R.	Edison Portland Cement Co.
Pennsylvania R.R.	Hercules Portland Cement Co.
Reading Company	Allentown Portland Cement Co.
	Whitehall Portland Cement Co."

Com. Ex. 1043 EE, FF)

Reports by the railroad interviewers were made to Collyer and are as follows:

[Italicized part quoted in Fdgs. Par. Eleven (e)]

Hercules — *"Mr. MacCarey, Traffic Manager of this company, was interviewed at Philadelphia on July 23rd and stated that while they were compelled to buy four trucks and trailers several years ago, that with the establishment of short haul rates in Trunk Line territory and also due to understanding with the other cement companies, they laid up their trucks and trailers about a year ago and have not trucked one ton since nor do they propose to do so. He stated, however, that they had a few cases of outside trucking companies coming to their plant and purchasing a few bags of cement but it was only for odd lots and did not amount in the aggregate to one carload per month. Mr. MacCarey expressed his hearty accord with the contemplated program and promised his sincerest cooperation."*[1]

Lehigh — [*"The undersigned had a conference with Colonel E. M. Young, President, Lehigh Portland Cement Company, at Allentown, Pa., on August 12th. We discussed the question raised by the National Building Material Dealers Association at considerable length and Colonel Young, with reservations due to competitive conditions in the trade at certain points, assured us of his desire to cooperate with the railroads and the Building Material people."*][2]

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[1] Com. Ex. 1149 B: Letter dated Aug. 26, 1931, Eysmans, Vice President, Pennsylvania R.R. to Collyer, Chairman, Traffic Executive Assn.

[2] Com. Ex. 1146: Letter dated Sept. 3, 1931, jointly—Hamilton, Vice President, C.R.R. of N. J., Stauffer, General Freight Traffic Mgr., Reading R.R., and Duffy, Vice President, Lehigh Valley R.R. to Collyer.

Penn-Dixie — *"Mr. Smith of the Pennsylvania-Dixie Company manifested a sympathetic attitude toward Building Supply Dealers with respect to the position they have taken in this matter."*[3]

Lone Star — *"Messrs Hogan and Koch expressed an attitude similar to that of Mr. Smith and asserted that they were not using trucks in the East, and at their mills outside of the eastern territory they were loaded only when competitive conditions demanded."*[4]

Wabash — *"Mr. H. F. Jennings, Secretary and General Manager of the Wabash Portland Cement Company, who have a plant at Osborn, Ohio, was interviewed, and he stated he was heartily in favor of the use of railroads, instead of motor trucks, for his shipments."*[5]

Southwestern — *"Mr. W. J. Jennings, General Manager of the Southwestern Portland Cement Company, who also have a plant at Osborn, was likewise interviewed, and he stated they were endeavoring to discourage their dealers specifying truck service, and in order to bring this about, they are adding 15¢ per barrel on movements via truck over their prices for shipments via rail."*[6]

Bessemer — [*"Representatives of the P. & L.E. and P. R.R. conferred with Mr. J. L. Dankel,*

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[3] Com. Ex. 1145: Letter dated Sept. 3, 1931, Duffy to Collyer.

[4] Com. Ex. 1145: Id. The balance of this letter is quoted, *supra*, pp. 1488-89.

[5] Com. Ex. 1153: Letter dated Sept. 23, 1931, Brister, Vice President, New York Central Lines to Collyer.

[6] Com. Ex. 1153: Letter dated Sept. 23, 1931, Brister, Vice President, New York Central, to Collyer, Traffic Executive Assn.

Sales Manager, and Mr. G. T. Peterson, Traffic Manager of this company at Youngstown, O., on the 13th instant, in the absence of Vice President Schmutz. These gentlemen expressed themselves as being heartily in accord with the position of the New York conference on the 22nd ultimo and stated that they have been actively interested in the elimination of trucking in the Youngstown district.

* * *

They further stated that dealers will not object to this as there is great danger under present conditions of their being eliminated altogether through delivery by trucks direct from mills to consumers.

The Bessemer people are confident that the proposed adjustment in the short haul rates on cement will have the effect of entirely eliminating truck transportation of cement.

* * *

If an adjustment as suggested is made by the carriers, it will enable the cement people to assess a charge of 10 cents per barrel higher for cement loaded in trucks than when loaded in cars, such charge to cover the higher cost of loading and the stacking of material, which necessary in order to be ready to load into trucks at all times. It is felt that such an adjustment will also remove the margin from price allowed distributors which is the stimulus to truck movement. Distributors will not object to this, for there is danger under present conditions of their being eliminated altogether through delivery by trucks direct from mills to consumers. The Bessemer people are confident that

an adjustment in the short haul rates on cement will have the effect of entirely eliminating truck transportation of cement."][7]

[Italicized part quoted in Fdgs. Par. Eleven (e)]

Peerless *"The Peerless Cement Company stated they endeavor to ship via rail at all times, but are confronted with competition created through trucking on the part of other cement companies."*

Alpha-Edison ["We have conferred with the representatives of the Edison Portland Cement Company and the Alpha Portland Cement Company and (they) would be perfectly agreeable to sitting in for a discussion of the whole question again, as between the carriers any time you may arrange such a conference."][9]

Universal Atlas ["*President B. F. Affleck, of this concern, was interviewed at Chicago on the 7th instant and corroborated the statements made by Messrs. Campbell, Holway and McFarland at the New York conference on July 22nd as to the injurious effect that trucking is having on the cement industry. Mr. Affleck stated if there is any reasonable indication that the rest of the manufacturers are willing to discard the use of trucks or put on a 15¢ differential where trucks are used, he is quite*

[7] Com. Ex. 1043 EEE-FFF: Letter dated Aug. 26, 1931, Eysmans to Collyer.
Com. Ex. 1360 A, B: Memorandum by a Pennsylvania Railroad employee of conference held August 13, 1931.

[8] Com. Ex. 1152 A, B: Letter dated Sept. 11, 1931, Brister to Collyer.

[9] Com. Ex. 1143: Letter dated Aug. 11, 1931, Duke, Vice President, D.L. & W.R.R., to Collyer.

certain their company will be willing to cooperate."][10]

Medusa [*"Have talked to Mr. George Cole, Traffic Manager of the Medusa Portland Cement Co., Cleveland, and he has definitely stated to me that the Medusa Portland Cement Co. will be glad to discontinue trucking if the other cement companies will agree to do likewise."*][11]

On the witness stand, however Cole had no recollection of having made the statement attributed to him.[12] He admitted, however, frequent contact with Day and that he had expressed to Day dissatisfaction with the trucking situation, explaining that Medusa continued solely to meet competition.[13]

Standard ["Talked to Mr. Al. Ingley of the Standard Portland Cement Co.

He agrees that something should be done to stabilize prices and is willing to cooperate, but does not feel that this can be accomplished by an attempt to eliminate trucking; in fact, he feels that to a certain extent it would be impossible to eliminate trucking."][14]

Universal Atlas ["Also talked to Mr. Frank Guy of the Universal Atlas Cement Co. when he was in the office a few days ago. He had not

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[10] Com. Ex. 1364: Memorandum by Eysmans dated Aug. 7, 1931. Com. Ex. 1149 A: Letter dated Aug. 26, 1931, Eysmans, Vice President, Penn R.R., to Collyer.

[11] Com. Ex. 1144: Letter dated Aug. 3, 1931, Day, Vice President, Nickel Plate R.R., to Collyer.

[12] Cole, Traffic Manager, Medusa (R) Tr. 40900.

[13] Id., Tr. 40935.

[14] Com. Ex. 1043 LL: Memorandum dated Aug. 7, 1931, by Day.

previously heard of this movement but was very much interested. He likewise is desirous of doing everything possible to stabilize prices. He expressed doubt that trucking can be entirely eliminated. He intends discussing the matter with his officials."][15]

[Italicized part quoted in Fdgs. Par. Eleven (c)]

Huron & Wyandotte

"The Wyandotte and Huron Companies expressed their desire toward confining their trucking operations to within a radius of twenty five miles of their plant, but they likewise are affected by general trucking conditions. Because of the ability of these two concerns to deliver their cement to construction jobs at a cost lower than via rail transportation, and the fact they have in some instances met delivered prices instead of F.O.B. plant, it has resulted in demoralization of the Michigan situation where a standard price with freight rate equalization has governed in the past, and there appears to be no immediate outlook for any improvement.

In some instances the trucking concerns handling cement have a relationship with the cement companies, in view of which no definite expression can be obtained from the cement companies as to what action can be taken to remedy the situation. There appears to be keen competition, and with the present low ebb of their sales, resulting in reduced production, every effort is being made to dispose of their current output."[16]

[A. P. Meyer, Secretary of Green Bag, Pa., was reported in a memorandum of a conference between representatives

[15] Com. Ex. 1043 LL: Memorandum dated Aug. 7, 1931, by Day.

[16] Com. Ex. 1152 A, B: Letter dated Sept. 11, 1931, Brister, Vice President, New York Central R.R., to Collyer.

of two railroads and his company, as having refused to commit himself to his railroad interviewers as to whether or not he would discontinue truck deliveries, saying "* * * that is a question on which the manufacturers themselves would have to get together for determination."[17] The author of this memorandum was not identified in any way.][18]

Eysmans, who had not taken part in the interview, summarized the results of the conference as follows:

[Italicized part quoted in Fdgs. Par. Eleven (e)]

"1. Green Bag Cement Company selected Neville Island as an advantageous location to serve the Pittsburgh District and intend to make the best of this advantage, which includes short haul truck transportation.

2. They think that a reduction in freight rates is not the solution to the problem, which must be worked out within the cement industry itself.

3. Mr. Meyer will make no commitment to discontinue the use of truck transportation, but indicated that if this is done it will be the result of an understanding within the cement industry rather than through intervention by the National Building Material Dealers Association or the railroads." (Com. Ex. 1043 JJJ)

Pomeroy, the Pennsylvania Railroad representative who conferred with both Green Bag, Pa. and Bessemer, testified that he met these companies separately and that at neither of these meetings did he come to any understanding or agreement with the companies that they would act in any certain way.[19]

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[17] Com. Ex. 1361: Memorandum of a conference with Meyer held August 27, 1931.

[18] Pomeroy, Ass't to General Traffic Manager, Penn R.R. (C) Tr. 10126.

[19] Id., Tr. 10128-29.

3. The January 7, 1932 Meeting in Philadelphia

Campbell, President of the National Builders' Supply Association, wrote to Eysmans, of the Pennsylvania Railroad, on July 31, 1931, as follows:

> "At our National Board [National Builders' Supply Association] meeting in Toronto last Monday and Tuesday, it was decided to start a vigorous educational campaign in our National publication against this evil and to create proper sentiment among our members.
>
> We—the manufacturers and dealers—feel that the Railroad officials, after a thorough study of our suggestions made in New York, should call the next meeting for further conference on this trucking subject. The manufacturers will soon be planning their 1931 marketing policies. If they are to attempt eliminating trucking next year, such announcement should be made before January 1, 1932. The manufacturers and dealers will desire to know the attitude of the railroads." (Com. Ex. 1358)

On August 21, 1931, Eysmans wrote Campbell:

> "I have read with much interest the circular from dealers in the Pittsburgh District to cement manufacturers, announcing that on and after December 1, 1931, a certain list of building supply dealers will purchase their requirements in carloads only, etc.
>
> • • •
>
> Have asked Mr. R. N. Collyer, Chairman of the Trunk Line Asssociation, who was present at our meeting in New York last month, to arrange a meeting at an early date with the gentlemen whom you have addressed. It may be decided that we should have another meeting with you and your associates." (Com. Exs. 1354, 1043 ZZ)

[In response to the suggestion of Eysmans, Collyer, Chairman of the Traffic Executives Association, Eastern

Territory, wrote a circular letter dated August 25, 1931 to the officers of seven railroads,[1] saying:

> "It will be noted that suggestion is made for a further conference of those who attended the meeting on July 22, and based thereon we shall arrange for such conference at the earliest possible date.
>
> We have taken the liberty of addressing Mr. Campbell for the purpose of advising him that the matter has not been dropped by the carriers, but that conferences with individual shippers have been held along the lines suggested at the July 22 meeting.
>
> We shall be glad to have further advices as to such conferences with Cement producers which have already been held." (Com. Ex. 1043-3 A)]

In a letter dated August 30, 1931, Campbell wrote MacFarland:

> "President of the Trunk Lines writes me that he will call a meeting soon at which you and ourselves will be asked to attend. This I feel will come within the next fortnight." (Com. Ex. 1462)

[The record shows that the Traffic Executives Association at their meeting in New York on September 17, 1931, discussed the developments of the conferences between railroad executives and cement manufacturers, and concluded that—

> "* * * further conference of Traffic Executives and interested parties be arranged for an early date." (Com. Ex. 1043-3 Q)]

[A few days later Morris, Chairman of the Central Traffic Executive Committee, Chicago, sent a circular letter to the railroads under the title "Trucking Rates on

[1] The persons addressed were Brister (N.Y. Central), Eysmans (Penn.), Duffy (Lehigh Valley), Hamilton (Central R.R. of N.J.), Hilleary (Reading), Duke (D.L. & W.), Day (Nickel Plate).

Building Material", and attached an extract from the proceedings of the July 22nd conference. Morris said:

> "The several Traffic Executives who attended the meeting on July 22 have conferred with Cement manufacturers and, generally speaking, have assurances of a desire on their part to coopefate with the carriers in discouraging the use of motor truck for the transportation of their product.
>
> As you will have noted from Item 49 of the proceedings at meeting of the Traffic Executive Association-Eastern Territory on September 17, it is deemed desirable that a further conference of Traffic Executives of interested parties be arranged for an early date, and we shall be glad if you will promptly advise as to the Central Traffic Executives who desire to be parties to such a conference." (Com. Ex. 1043-3 S)]

[The Central Traffic Executive Committee held a meeting in Chicago on September 30th. Executives from eight railroads were designated to attend a——

> "* * * proposed conference between Traffic Executives of carriers in Official Classification territory and representatives of the National Building Material Dealers Association."][2]

On November 13, 1931, Campbell wrote Eysmans:

> "I feel, Mr. Eysmans, that if we could have a meeting with a few Traffic Men and the head men of Purchasing Departments for an hour or two, we could cooperate to better advantage."

Campbell also said in this letter:

> "For your information, and information which I shall appreciate if you will disseminate to your con-

[2] Com. Ex. 1043-3 T: Representatives designated were Lewis (B & O), Vernia (CI & L), Flinn (G.T.), Clark (N.Y. Central), Day (Nickel Plate), Cox (Pennsylvania), Paterson (Pere Marquette), Early (Wabash).

tacts in other Railroads, I will say that no one in our Association, aside from the members present at our New York Committee, know anything at all about my personal efforts. I haven't thought it wise to disclose anything, then there can be no misinterpretation or misrepresentations. No one enters the picture excepting myself on either side of the fence. I involve no one. I do not think it wise. In the final analysis I know nothing.

My reason for writing the above paragraph is that a certain man representing a Railroad, called at the Cleveland office to ask if he and their Railroad could be of further assistance. No one in the Cleveland office knew to what he referred. I know you get my point." (Com. Ex. 1349)

[Oliver, of the Pennsylvania Railroad, reported to Large, General Traffic Manager, on November 17, 1931, inquiring whether the traffic executives expected to meet with cement manufacturers, or had it been decided to abandon any further efforts through executive channels.][3]

[A letter Collyer to Campbell dated December 8 shows that railroad executives were prepared to meet with Campbell at New York or Cleveland on January 7, 1932.[4] Philadelphia was finally fixed as the meeting place.][5]

A memorandum of the conference reads in part as follows:

"*Present*:

Representing Dealers.

Mr. W. W. CAMPBELL, Pres.,	National Builders' Supply
Mr. E. J. HOLWAY, V.P.	Association.
Mr. D. H. MCFARLAND, Pres.,	Cement Institute.

[3] Com. Ex. 1365.

[4] Com. Ex. 1043-4 J.

[5] Collyer sent a wire to fifteen railroads, fixing the date of the meeting as January 7, 1932 at Philadelphia. Com. Ex. 1043-4 Q, R.

Representing Carriers.

Mr. W. T. Stevenson, Asst. V.P.,	New York Central Lines.
Mr. J. B. Large, G.T.M.,	Pennsylvania Railroad.
Mr. W. R. Cox, T.M.,	Pennsylvania Railroad.
Mr. C. E. Walsh, Pur. Agent,	Pennsylvania Railroad.
Mr. G. C. Manning, Asst. V.P.,	Erie Railroad.
Mr. C. A. Blood, Asst. V.P.,	Lehigh Valley Railroad.
Mr. J. J. Byrne, G.F.T.M.,	D., L. & W. R. R.
Mr. A. Hamilton, V.P.,	Central R. R. of New Jersey.
Mr. H. C. Stauffer, G.F.T.M.,	Reading Company.
Mr. E. F. Flinn, F.T.M.,	Grand Trunk Railway
(Represented by Mr. W. P. Fitzsimons)	
Mr. O. S. Lewis, G.F.T.M.,	Baltimore & Ohio Railroad.
(Represented by Mr. C. M. Gosnell)	
Mr. R. N. Collyer, Chairman,) Mr. D. T. Lawrence, Vice-Chairman,)	Traffic Executive Assn. Eastern Territory.

-oOo-

Mr. R. N. Collyer, presiding

-oOo-

Mr. Campbell, on behalf of the National Builders' Supply Association, reviewed the progress which had been made since conference on July 22, 1931, as the result of efforts by dealers and carriers to induce Cement manufacturers to revert to the use of rail carriers instead of truck service in the movement of Cement, thereby stabilizing price conditions in the trade, which had become demoralized because of absence of any uniform basis of transportation charges for truck movement.

[Italicized part quoted in Pdgs. Par. Eleven (f)]

It was stated that in southern Ohio and Western Pennsylvania substantially all of the Cement traffic had been returned to the rails, and that initial steps had been taken having in view like result as to shipments for the lake front district, centering principally at Buffalo, Cleveland, Toledo, Detroit and Chicago. The further cooperation of the rail carriers was requested, along the lines suggested at the conference of July 22, with respect to this traffic as well as similar situation in eastern Pennsylvania, Maryland and District of Columbia.

Mr. Campbell's remarks were supplemented by Mr. McFarland, who advised of the conditions in the Cement industry which had brought about the establishment of an additional charge on shipments of Cement delivered to trucks at the plants for over-the-road movement.

This charge, it was pointed out, served to reduce the margin of difference available to the irresponsible transportation agency as against freight charges by rail.

Mr. McFarland suggested that carriers could probably assist in securing the return of the Cement traffic to the rails if they were to reduce their short-haul rates for distances up to 35 or 40 miles, increasing the minimum carload weight by 15 to 20 tons in order to preserve their per car revenues. It was pointed out that this question had been the subject of conference between carriers and shippers some time since, and that the carriers, before further consideration of the matter, were awaiting advice from shippers as to their suggestions with respect to a proposed scale of short haul rates.

A review of the improvement which had been effected in trade practices was presented by Mr. Holway, including advice as to the understanding of dealers in the Ohio-Pennsylvania District that where equitable practice and market stability require, shipments shall be made in carload quantities by rail." (Com. Ex. 1043-4 S-U)

4. Other Dealer Activities in 1931

Campbell wrote on July 31, 1931 that at the National Board meeting in Toronto the National Builders' Supply Association resolved to begin a "vigorous educational campaign" against the trucking "evil".[1]

The action of the National Builders' Supply Association was supported by the Ohio Builders' Supply Association. Kinney (OBS Secretary) on August 7, 1931 wrote to an Ohio dealer, in part as follows:

> "Our conclusions are that delivery by truck from manufacturers' plants, whether they be by those of the dealer or belonging to independent operators have tended to shrink the net profits of supply men.
>
> The practice has virtually nullified his warehouse business, has encouraged direct selling by unscrupulous manufacturers and has been most detrimental to railroads.
>
> We are thoroughly convinced that trucking is now the greatest single factor in upsetting market conditions throughout the State.
>
> Therefore, as an organization, we are going to bend every energy in the direction of the complete elimination of truck delivery thereby re-stabilizing yours and every other market. Now, while you are a member of the Ohio Builders' Supply Association, will you not fully cooperate with us in this constructive endeavor,—taking all future shpiments by rail." (Com. Ex. 1342)

[Correspondence exchanged between officers of the Ohio Builders' Supply Association and the New York State Builders' Supply Association are entirely concerned with a comparison of the interest of the members of the two associations in the elimination of trucking.

Hansen, OBS President, advised Corrou, NYSBS Secretary, that although there had been "no progress" in preventing trucking in the Toledo market, there had been

[1] Com. Ex. 1358: Campbell to Eysmans.

"some success" in this matter in other parts of the State.[2] This letter was given to Kinney, OBS Secretary, who confirmed the description of the Toledo situation and said that Youngstown dealers had eliminated trucking.][3] In another letter Corrou asked Hansen whether the failure to eliminate trucking in Toledo was due to manufacturers or to the wishes of local building supply dealers, adding that a questionnaire to New York dealers showed that 314 were opposed to trucking as against 91 in favor of it.[4] Hansen replied that the majority of building supply dealers in the locality of Toledo would undoubtedly welcome a discontinuance of trucking if it could be done with justice to all. He then explained that Medusa had a plant about 6 miles from the center of the city, whereas Huron had a plant located in the heart of the city, adjacent to the yard of one of the largest dealers.[5]

Kinney, secretary of the Ohio Builders' Supply Association was reproved by Holway (OBS Cement Chairman) for sentiments regarding efforts to eliminate trucking expressed by the former at a certain dealer meeting in Canton, attended by two manufacturers.[6] Kinney replied saying that he had been misunderstood. He wrote that he was 100% opposed to trucking but that after hearing the views of dealers in small communities, he concluded that:

> "* * * the issue could not be forced as of a District, and would necessarily have to be handled by individual communities."[7]

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[2] Com. Ex. 1043-2 P: Letter dated Aug. 15, 1931, Hansen to Corrou.

[3] Com. Ex. 1043-2 Q: Letter dated Aug. 22, 1931.

[4] Com. Ex. 1490: Letter dated Aug. 26, 1931.

[5] Com. Ex. 1491: Letter dated Aug. 29, 1931.

[6] Com. Ex. 1043-3 U: Letter dated Oct. 7, 1931.

[7] Com. Ex. 1043-3 V: Letter dated Oct. 12, 1931.

The Secretary of the Indiana Builders' Supply Association, evidently unaware of the July 22 conference, urged Holway to bring to the attention of railroads the dealer attitude toward trucking.[8]

In the meantime MacFarland and Campbell had frequently corresponded and had once met to discuss the subject of promoting a campaign to arouse public sentiment against trucking. There are several documents and considerable testimony relating to the exchange of communications between MacFarland and Campbell which began when MacFarland sent Campbell a cartoon on the subject of trucking. These are outlined in the footnote.[9]

On August 5, 1931 MacFarland wrote to Boynton of the New York Air Brake Co.:

> "It seems to me that if anything is worked out, we ought to try first Ohio, Pennsylvania and Michigan. This seems to be the section of the country

[8] Com. Ex. 1043-3 o: Letter dated Sept. 11, 1931, Hildebrand to Holway.

[9] July 25, 1931 MacFarland sent Campbell an anti-trucking cartoon taken from the New York Herald Tribune. (Com. Ex. 1455, Resp. Ex. 2179 (the cartoon).) He accompanied a second cartoon to Campbell with a statement that the time was ripe to create large public sentiment against trucking and urged that Campbell and he meet before long. Com. Ex. 1456, letter dated July 29, 1931. (Resp. Ex. 2180 (the cartoon).) MacFarland testified that both of these letters were written to Campbell in MacFarland's capacity as an officer of Medusa (Tr. 30998-31004). Campbell forwarded MacFarland's letters to Eysmans, saying that he had a date to see MacFarland on Wednesday, August 5, 1931. (Com. Ex. 1358—Campbell to Eysmans, July 31, 1931.) One of the sources of MacFarland's information about rising public sentiment against trucking came from an officer of the New York Air Brake Co., C. H. Boynton. (Resp. Ex. 2181, Boynton to MacFarland, Aug. 4, 1931. Com. Ex. 1466, MacFarland to Boynton, Aug. 5, 1931.) MacFarland testified that Boynton was interested in the subject because with more traffic on the rails, Boynton would sell more air brakes. MacFarland (Tr. 31071).

that is polluted with trucks more than any other section I know of.

After Mr. Campbell has seen these railroad people, he will again talk with me. He seems quite favorable to the plans you and I talked of and sees no reason why a start could not be financed. * * *"

MacFarland testified that the "plans" he referred to in this exhibit were plans to create public sentiment to regulate truck traffic.[10]

In August, 1931 the Pittsburgh Builders' Supply Club adopted a resolution giving notice to cement manufacturers serving Pittsburgh that on and after December 1, they would purchase their requirements in carloads only. Campbell sent word of this to Collyer who relayed word to the seven railroads serving Pittsburgh.[11]

Before this resolution was adopted and on June 12, 1931 a Universal Atlas interoffice memorandum from Hoy, Pittsburgh sales manager, to Stone, general sales manager, reads in part as follows:

"* * * You can see the fine hand-writing of Bob Long of Lehigh, McKee of West Penn and Denkle of Bessemer. All of these companies are continually urging the dealers to use their influence to have trucking discontinued in Pittsburgh, giving them the impression that if this were done it would clean up the situation thruout the entire country." (Com. Ex. 2654)

[Shortly after the resolution of the Pittsburgh Builders' Supply Club, Oliver, of the Pennsylvania Railroad, reported to his superior:

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[10] MacFarland (R) Tr. 31012-13. On this see also note 9, *supra*.

[11] Com. Ex. 1043-2 U-W: Letter dated Aug. 19, 1931, Campbell to Eysmans et al. Eysmans acknowledged its receipt, Com. Ex. 1043-2 Z, letter dated 8/19/31, and referred it to Collyer.
Com. Ex. 1043-3 A: Letter dated Aug. 25, 1931, Collyer to seven railroads.

"Referring further to our efforts to eliminate the trucking of cement: the proposed trip of Pittsburgh Dealers to Chicago never materialized, the local dealers deciding they could not well afford to go over the heads of the local Universal people. Then too, the announcement of the Pittsburgh Builders' Supply Club approximates an ultimatum and it was felt that any interview with the Chicago people of the Universal Cement would weaken their declaration. The Universal's attitude now is, according to Mr. McKee, of the West Penn, that they do not want to start anything but, if the situation can be cleared up in Ohio, they will correct their situation here, further providing the Green Bag go along.

There is a movement on foot to have Columbia, Lehigh, Medusa, Bessemer and West Penn announce the discontinuance of trucking effective December 1st * * * which will go far in forcing Universal and Green Bag to discontinue trucking."][12]

On the witness stand, McKee denied having any such conversation with any Universal official and denied he had been in any position to state Universal's attitude. He testified he believed he told Oliver that, judging from previous observation, he believed Universal would do certain things.[13]

Stone, Vice President, Universal Atlas, denied that he had said anything like that to McKee and added that "there was nobody in our organization with authority to make any such statement to McKee except myself or Mr. Affleck. No one could say that they knew what he was talking about, and surely they did not have authority to say it because they don't know or didn't know that we were going to take the action that was indicated there."[14]

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[12] Com. Ex. 1363, Oliver (Pa. R.R.) to Large, Aug. 27, 1931.

[13] McKee, Vice President, West Penn (R) Tr. 27804-07.

[14] (R) Tr. 35223.

Letzkus, Sales Manager of Pittsburgh, denied all knowledge of the movement described in this letter.[15]

On November 11, 1931, Campbell, President of the National Builders' Supply Association, sent Eysmans of the Pennsylvania Railroad a copy of a letter from the Indiana Builders' Supply Association advising of action by Indianapolis dealers in eliminating trucking.[16] Campbell also reported that Canton, Ohio dealers had requested manufacturers to ship all commodities to that city by rail and that New Castle dealers would probably force all shipments to be made by rail delivery, effective December 1st. Campbell added:

> "One by one we are closing the doors to trucking. We will appreciate your influence in Buffalo, Detroit, Cleveland, Chicago and Pittsburgh—key points.
>
> Note, especially, the second carbon copy accompanying this letter. I shall appreciate it if you will give it attention.
>
> * * * please know that all efforts for the elimination of trucking and regarding all shipments to railroads are handled by the writer, individually."

No document has been identified as the "carbon copy" referred to in the Campbell letter quoted above, but Com. Ex. 1355 taken from the Pennsylvania Railroad files by the Commission at the same time as Campbell's letter, appears to fit the description. It is an undated, unaddressed, unsigned memorandum reading as follows:

> "If trucking can be eliminated in Buffalo, Detroit, Cleveland, Chicago and Pittsburgh, we will have largely solved the problem of trucking.
>
> The following Cement Companies, in the order named, are largely responsible for current condi-

[15] (R) Tr. 37864.

[16] Com. Ex. 1351.

tions. These companies must be reached and persuaded to eliminate trucking from their warehouses and plants:

Huron Cement Company
Universal Atlas Cement Company, Chicago and Pittsburgh
Standard Cement Company, Cleveland
Bessemer Cement Company, Youngstown, O.
Green Bag Cement Company, Pittsburgh.

If the Huron Cement Company will stop trucking, we believe the others will follow. The Huron Cement Company sells alkalies to the Railroads.

Your Purchasing Departments can assist in persuading the Huron and other companies to desist trucking.

We will appreciate emphasis being placed on Buffalo first. The dealers there are insistent on stopping this practice in the City and district of Buffalo. We must have your earnest cooperation, NOW. In Pittsburgh, Green Bag Cement and Universal-Atlas (which is the U. S. Steel), need effective persuasion.

Your influence will be appreciated."

The attitude of Universal Atlas officers as late as November 14, 1931, towards the discontinuance of trucking, is expressed in a memorandum by Stone, then general sales manager, to Hoy, manager of the Pittsburgh office. Stone said:

"*Pittsburgh Builders Supply Club*.

Attached is a copy of letter November 12, from L. I. MacQueen, Executive Manager of above. The letter has not been answered from here and we suggest that you advise Mr. MacQueen that you have a copy of it. Other than that our only suggestion is that you tell Mr. MacQueen of my talk some time ago with Mr. Kennedy and let him know that we would be only too glad to have the trucking influence

in the cement industry improved if we only knew a way to do it."[17]

The letter from MacQueen is addressed to Affleck, president, Universal Atlas and is an appeal on behalf of dealers handling more than 90% of the cement tonnage in Pittsburgh that Universal Atlas use its best efforts to establish a national policy among all producers that "all delivery of cement to dealers be made by rail."[18]

5. Dealer-Producer Meetings in November 1931: Chicago & Cleveland

[On November 11 the secretary of the National Builders' Supply Association wrote the president of the Ohio Builders' Supply Association requesting the latter to urge his membership to express disapproval of trucking cement to the cement manufacturers at the Portland Cement Association meeting in Chicago, November 17-19, 1931 (Com. Ex. 1043-3 Z).]

In a letter dated November 23, 1931, marked personal and confidential, Holway reported to Eysmans, Vice President, Penn. R.R. that he had attended this meeting in Chicago.

He said:

[Italicized part quoted in Fdgs. Par. Eleven (f)]

"Realizing that the larger manufacturers would undoubtedly travel Sunday night, I arranged to be in Chicago on Monday, the 16th, and visited a number of them, especially the larger ones, leaving the thot with them, how far the legitimate dealer would go along to correct the trucking evil.

I understand that the Universal and Basic of Pittsburgh, will close their plants to trucks on December 1, and I think the Ohio plants will have a meeting the latter part of this week, and I believe it will be the unanimous opinion of all the Ohio

[17] Com. Ex. 2655.

[18] Com. Ex. 2656.

manufacturers that they should follow the Pittsburgh lead, so that I think all plants in Eastern Pennsylvania and all of Ohio, will be closed to trucking by not later than December 31, 1931. As cement goes, other basic lines follow."

* * *

You can readily understand there is no copy of this kept in my files and I will kindly ask that you destroy it."[1]

Kinney, Secretary of the Ohio Builders' Supply Association, turned over to MacFarland a list and bundle of letters in Chicago.[2] MacFarland testified that the list referred to was a poll of Ohio dealers showing that practically all were opposed to trucking, and that the bundle of letters referred to consisted of dealers' views on trucking. These dealers were all Medusa customers or potential customers.[3] On cross-examination Commission's counsel attempted to relate the exchange of letters to a meeting of some sort in August but MacFarland said the exchange took place in August when he met Kinney individually. Neither could MacFarland recall that any meeting was in progress in Chicago at the time of the exchange, nor could he recall seeing Holway or Campbell at the same time.[4] Furthermore, he said he did not attend any meeting in Chicago around November 17, 18 or 19 attended by dealers and railroad officials on the matter of trucking.[5]

There is no evidence as to what took place at the Portland Cement Assocation meeting in Chicago or any further evidence on this subject.

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[1] Com. Ex. 1348 A, B.

[2] Com. Ex. 1458: Letter dated December 9, 1931, MacFarland to Kinney.
Com. Exs. 1457, 1043-4 i: Letter dated 12/11/31, Kinney to MacFarland, in reply.

[3] MacFarland, Vice President, Medusa (R) Tr. 31020-22.

[4] Id., Tr. 31087, 31089-91.

[5] Id., Tr. 31014.

As to the Cleveland matter, MacFarland and Cole each testified that he did not attend a meeting in Cleveland on November 27 or 28, 1931, nor did he take part in any arrangement of the meeting.[6]

MacFarland testified that he knew of no agreement among manufacturers to discontinue trucking in Ohio on December, 1931.[7]

Letzkus of Pittsburgh testified as to a meeting at the Hollendon Hotel in Cleveland and said that there were maybe five or six manufacturers and between possibly five and twelve dealers present.[8]

As to this meeting he testified as follows:

> "Q. Were you in Cleveland on or about November 27, 1931? A. I do not recall.
>
> Q. Do you recall registering at the Hotel Hollendon about that time? A. I could not tell you definitely on that. I go to Cleveland frequently.
>
> • • •
>
> Q. Wasn't there a meeting at the Hotel Hollendon along about November 27, 1931? A. I would not know of any meeting.
>
> Q. Well, did you attend any meeting? A. Yes, one. I do not know whether you call it a meeting.
>
> Now, I have one outstanding thing in my mind. I do not know just when it was, but it was a good many years ago. A dealer asked me to come to Cleveland, that he wanted to discuss some business matters——
>
> • • •
>
> A. I do not recall what dealer it was now. That was not an extraordinary request, and he told me he would meet me, that was the Hollendon Hotel. This kind of stands out a little, I cannot remember the details, but I can give you enough, I think.

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[6] MacFarland, Vice President, Medusa (R) Tr. 31020.

[7] MacFarland, *supra*, Tr. 31029.
Cole, Traffic Manager, Medusa (R) Tr. 40902.

[8] (R) Tr. 38004-05.

"I went down there with the idea of meeting this dealer, had no idea what he had in mind, or anything else, went to the hotel and went into the room where I was supposed to meet him, and I was amazed to see several cement men sitting there. So right away I wondered what was up, and I tried to find out and nobody else seemed to know, and after a little while—this was in an adjoining room,—this dealer came out and invited me to go in. By that time I figured I had kind of been taken advantage of, so I was perfectly willing to face most anybody about then for a few minutes, so I went into this room and again to my amazement there were several dealers sitting around the room, and it was not a very pleasant meeting on my part because I was sore for having been, as I considered, double-crossed. Now, I was there, and those dealers, as I recall, well, they did all the talking. I just sat there and listened, and it had to do with trucking, and I fought back a little bit to a couple of them there, naturally, but I made no commitments and no agreements, and got out of there just as quickly as I could, and told them what I thought of them. Now, that is the whole gist of that thing.

By Mr. Paulson:

Q. Was it Mr. Holway or Mr. Campbell that notified you? A. I do not know Mr. Campbell; without being able to mention any names, it seems to me—I know this, I was impressed when I looked around and saw these fellows sitting there, that they were the larger dealers that I knew all around; I do not remember how many there were; there might have been eight or ten or twelve of them. Now, I could not, you understand that much of our business is with dealers, and while you might be sore as a pup about having been put in that position, nevertheless I had to use my head a little bit because some of those fellows probably were buying our cement, but that was about the whole story of that particular meeting." (Tr. 38000-38002)

I. Efforts to Reduce Short Haul Rail Rates in CFA Territory: 1931-1932.

1. Early Activities of Cole, Traffic Manager, Medusa

Cole, Traffic Manager, Medusa, testified that he first became interested in securing reductions in short haul rates in 1927 and 1928, when new plants were started in Ohio.[1] He thought that the 12710 scale then in effect had become inequitable in Ohio and that he thought it should be revised up to 50 miles.[2]

The 12710 scale was promulgated in 1923 in an Interstate Commerce Commission order in Docket No. 12710. The original order was applied to certain CFA territory but it was extended to include Ohio and Western Pennsylvania.[3] The original scale fixed rates for distances up to 700 miles. This benefited the long haul shipper. At that time Medusa was a long haul shipper, so it favored the scale.[4] When the 12710 was first applied, there were only five mills in Ohio,[5] whereas, on September 1st, 1931, there were 10 mills and 4 silos in Ohio and 6 mills in Western Pennsylvania.[6]

In 1927 the Sandusky Company (Medusa) applied for a short haul rate reduction and failed.[7] In 1929 Medusa successfully applied for reductions in short haul rates from the York plant in order to meet truck competition,[8] and in

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[1] (R) Tr. 40851.

[2] Id., Tr. 40868.

[3] Id., Tr. 40828-33.

[4] Id., Tr. 40846-47.

[5] Id., Tr. 40830. Bay Bridge, Castalia, Ironton, Superior, Middlebranch; Tr. 40834.

[6] Resp. Ex. 3235: List of mills and silos.

[7] Cole, *supra*, Tr. 40834-36; Resp. Ex. 3232: Statement of rates prepared by Medusa.

[8] Id., Tr. 40840-41.

1930 it made an unsuccessful application for reduction in short haul rates in Wisconsin.[9]

Cole said that about the time he requested and began to work for a reduction in short haul rates, he had given consideration to the statements made in the ICC opinion accompanying the order in October, 1931, granting railroads a 15% increase in rates.[10] This opinion contains the following statements:

> "Movement by truck is a new form of competition which has been developing with great rapidity. It has been principally effective on less-than-carload traffic, and relatively short haul of such commodities as livestock, cotton, cement * * *; but it is continually extending to more and more traffic, and for longer distances, as trucks and trailers are enlarged and highways improved. * * * The carriers introduced evidence to show that it would be feasible for the trucks to divert only a comparatively small amount of additional tonnage, even if rates were increased. But without exaggerating the menace of this form of competition, we are convinced that the carriers have underrated it, and that its possibilities are materially greater than they are prepared to concede. (p. 574)
>
> * * *
>
> * * * we believe that the traffic departments of the railroads should address themselves to the task of making such changes in the rates on particular kinds of traffic as will, in their judgment after careful analysis of all attendant circumstances, produce additional revenue and which can be supported as reasonable under existing conditions. This does not necessarily mean increases in rates. It is quite likely that there are now many rates which will produce more revenue if they are reduced, * * *." (p. 577)[11]

[9] Cole, Traffic Manager, Medusa (R) Tr. 40841-43, 40846.

[10] Id., Tr. 40858-59.

[11] Resp. Ex. 3236, page 577, opinion accompanying order of Interstate Commerce Commission, Ex parte No. 103, decided October 16, 1931.

Cole testified that he used this case to show the railroads that the existing short haul rates were mere paper rates—no tonnage was moving on them.[12]

Medusa would have been benefited by a reduction in short haul rates because it would "diminish localizing our immediate markets." Any reduction in a shipping rate would be a saving to his company and place it in a position to take care of its natural market at reasonable rates, both by truck and by rail.[13]

Cole testified that before he approached the railroads, discussion of the proposed reduction in short haul rates took place within the Medusa Company and that discussions and negotiations with the railroads were not done with the thought of eliminating trucking. Medusa's position was that it would be to its interest to negotiate with the railroads for a reduction. He testified that these activities were not in connection with the activities of W. W. Campbell or of Holway. Cole said that MacFarland did not ask him to undertake any negotiations with railroads about short haul rates.[14]

2. Background of Railroad-Producer Short Haul Rate Meeting: April 8, 1932

At a meeting May 5, 6 and 7, 1931, the Central Committee of the Central Freight Association[1] appointed a

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[12] Cole, Traffic Manager, Medusa (R) Tr. 40852-53, 40858-59.

[13] Id., Tr. 40869.

[14] Id., Tr. 40883-84.

[1] Freight associations are voluntary associations set up by railroads for handling rate matters in various territories. These associations are recognized by the Interstate Commerce Commission and are frequently referred to in their orders. Browder, Traffic Manager, Penn-Dixie (R) Tr. 38102-03; Resp. Ex. 2896.

special committee[2] to investigate trucking from cement plants.[3] Pursuant to this investigation railroads canvassed some cement manufacturers.[4] In reply to a request for information about Medusa trucking,[5] Cole, Medusa traffic manager, in a letter dated May 25, 1931, wrote the Wabash Railroad:

"• • • There are so many details involved as well as other cement companies that I feel much

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[2] Cole, Traffic Manager, Medusa (R) testified that he had nothing to do with the formation of the CFA Special Committee. It was strictly a railroad matter, Tr. 40890.

[3] Resp. Ex. 3246: Interoffice memorandum, Thiem (Medusa) to Cole 5/23/31.
Resp. Ex. 3245: Interoffice memorandum, Early (Wabash Railroad) to Wabash Traffic staff 5/15/31.

The latter exhibit shows that Early, a Wabash traffic executive, requested each of his field representatives to obtain answers to the following questions:

(1) Approximate tonnage currently trucked from cement plants;

(2) Distance trucked;

(3) Did equipment used belong to plant, consignee or common carrier truck company;

(4) Rates charged;

(5) Rates cement companies considered necessary to return traffic to lines.

[4] Com. Ex. 1043 F: Mossman (Wabash Railroad) to Early 5/15/31.
Resp. Ex. 3247: Cleveland (New York Central Railroad) to Thiem 5/26/31.
Com. Ex. 1043 i: Bors (Wabash Railroad) to Early 5/27/31.
Com. Ex. 1043 o: Gage (Wabash) to Early 6/10/31.
Com. Ex. 1043 J: Cole (Medusa) to O'Boyle (Wabash Railroad) 5/25/31.

[5] Resp. Ex. 3245: Cole testified that Early's inquiry was directed to Medusa because the Wabash Railroad indirectly served Medusa's plant. Tr. 40890.

more could be accomplished by having the Central Freight Association carriers and cement companies together for a discussion of the subject.

I would like to suggest that you put this up to the Chairman of the Special Committee and advise me.

I am sending a copy of your letter and this letter to the following cement companies for their information."[6]

Three days later Cole submitted the names of nine additional manufacturers to whom he had written regarding the railroads' request for trucking information. He said:

"* * * just as soon as you hear from Mr. Early as to the probability of a meeting please let me know so that I can advise the various cement companies."[7]

Instead of adopting Cole's suggestion for a meeting, the CFA special committee agreed to indefinitely postpone further action as the result of an "edict" issued at a conference of railroad presidents on June 24. The "edict" stated that no changes should be made in rates pending final outcome of an application for a general 15% increase in rates.[8] Hearings on the rate application were held for many weeks,[9] and the Interstate Commerce Commission

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[6] Com. Ex. 1043 J: Letter dated May 25, 1931, Cole to O'Boyle (Wabash Railroad). In this letter Cole named Lehigh, Southwestern, Standard, Universal Atlas, Alpha, Huron and Castalia as the companies to whom he had sent a copy of O'Boyle's letter. Each of these companies except Universal Atlas owned plants in Ohio.

[7] Com. Ex. 1043 M: Letter dated May 28, 1931, Cole to O'Boyle. The nine companies are Superior, Diamond, Bessemer, Wabash, Pittsburgh, West Penn, Basic (Green Bag, Pa.), Louisville and Kosmos.

[8] Com. Ex. 1043 X: Memorandum dated July 3, 1931, Williamson (Nickel Plate Railroad) to Day (Nickel Plate). See also Resp. Exs. 3249, 3250.

[9] Resp. Ex. 3236, p. 556.

order granting the increase was not issued until October 16, 1931.[10]

Cole testified that he sent his letter of May 25, 1931, above, to other cement companies as a short cut to obtain the information for the railroad committee because he knew these companies were interested in the question of short haul rate reductions.[11] He said that he suggested a meeting of carriers and shippers because he thought that was the only way the answers to the railroads' questions could be obtained.[12]

He testified:

> "Q. And who made the initial move,—the individual railroads or the Central Freight Association, if you recall? A. The railroads, as I recall, both by letters and by verbal conversations with me, were much concerned about the situation, and they suggested that the quickest way to solve it,—the problem,—would be to take the matter up with the Central Freight Association.
>
> Q. And did you take it up with the Central Freight Association? A. Yes, sir.
>
> Q. And what was the basis of your argument to the Central Freight Association about this 12710 scale?
>
> . . . .
>
> A. I pointed out to the Central Freight Association that the scale in and of itself, in so far as Ohio was concerned, was not adaptable under the then present conditions, and I supported that argument, with, I believe—I am not quite sure—but I believe a map showing a 50-mile zone in 10-mile blocks around each mill in Ohio at that time, which was in further support of my suggestion that they revise their

[10] Resp. Ex. 3236.
Cole, Traffic Manager, Medusa (R) Tr. 40851-53.

[11] Cole, *supra*, Tr. 40891.

[12] Id., Tr. 40889.

rates downward up to 50 miles, to regain some of the tonnage that they had lost to truck competition.

By Mr. Withrow:

Q. Now, after taking this matter up with the Central Freight Association, were other cement shippers contacted? A. Yes, sir.

Q. And at whose suggestion were they contacted? A. The railroads'.

Q. Did the railroads contact these shippers first, or did you, Mr. Cole,—do you recall? A. I do not know who made the initial calls, or wrote the letters, but, as I remember, the railroads were calling on most every interested shipper.

Q. Well, can you tell us whether or not it was necessary to call this to the attention of the other shippers in Ohio? A. Yes, sir; it was.

Q. And would you tell us why?

* * *

A. The reason it was necessary was because the railroads on this particular scale of rates would not make any change from any cement-producing point because the same yardstick was used in measuring the rates from these producing points to all the destinations, and, therefore, any change or suggested change would have to be before this railroad committee, and the interested shippers would have to express their opinion as to whether or not they were in favor of making any particular change." (Tr. 40869-72. See also Tr. 41258-59)

In case of rate changes it is the usual procedure for interested railroads and shippers to meet together. This has been in effect for years and years.[13]

Cole could not have secured the reduction in rates without notice to the other affected shippers.[14] Cole tried to

[13] Cole, Traffic Manager, Medusa (R) Tr. 40876-77; O.P. Tr. 40878-79.

[14] Id., Tr. 40880.

sell all competitors the idea that the competitors would be benefited by the reduced rate.[15]

A month after the January 7, 1932 meeting (see p. 1551, *supra*), Cole referred to the meeting as follows:

> "* * * on January 7 there was a meeting with Eastern Railroad traffic executives and some of the cement manufacturers including the president of the National Builders' Supply Association. The meeting was called to devise ways and means of eliminating trucking of cement. There were no traffic representatives of any cement companies at that meeting but later I was told that the railroad traffic executives would welcome a suggestion from the traffic managers of the cement companies for a revision in the cement rates to short-haul points if it would materially assist in eliminating trucking."[16]

On the witness stand Cole said he first heard about the meeting from MacFarland and railroad officials sometime after it had occurred[17] and he passed on the information in his letter about the January 7th meeting without giving much consideration to the truth of the statement.[18]

Late in January 1932, traffic managers of several of the larger cement companies met in New York.[19] After this conference, Cole of Medusa, who had been among those present, prepared a letter dated January 29, 1932, enclosing a statement of proposed short haul rates on cement.

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[15] Referring to statements in Com. Ex. 1701 A-B. Cole, Traffic Manager, Medusa (R) Tr. 40939-40. Referring to Com. Ex. 1675. Tr. 40942.

[16] Com. Ex. 1743: Letter dated February 19, 1932, Cole, *supra*, to Guy (Universal Atlas).

[17] Cole, *supra*, Tr. 41288-89.

[18] Id., Tr. 41135-37.

[19] Com. Ex. 1765 A-B: Letter dated February 12, 1932, Cole, *supra*, to Collyer, Chairman, Traffic Executive Association.

This letter was sent to traffic managers of all cement companies in Central Freight Association territory.[20]

In the letter Cole asked each manufacturer to state if the proposed short haul rate basis met with his approval:

> "* * * so that the necessary steps can be taken at an early date to have the traffic executives of the railroads involved, appoint a special committee to meet with a special committee of traffic representatives of the cement companies with a view of having the proposed rates adopted by the carriers and published at an early date."[21]

In a letter dated February 12, 1932, Cole advised Chairman Collyer[22] that all but three companies to whom he had sent his January 29th letter had acknowledged with approval the proposed rate scale and that the cement companies were now prepared to meet with a committee of railroad representatives to be appointed by Collyer. Cole also wrote:

> "It was thought best to confine the suggested rates * * * to the territory where the 12710 scale of cement rates is now applicable because there is no grouping of origins * * * and also because truck competition is more prevalent in Central Freight Association Territory as demonstrated in 1931."[23]

Cole requested Collyer to appoint to the Railroad Special Committee representatives of carriers serving the various cement plants concerned with the proposed rate change.[24]

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[20] Resp. Ex. 3255 A-B: Cole, Traffic Manager, Medusa (R) Tr. 40905.

[21] Resp. Ex. 3255 A-B.

[22] Chairman of the Traffic Executive Committee—Eastern Territory.

[23] Com. Ex. 1765 A-B.

[24] Id.

He added:

> "Inasmuch as Mr. W. W. Campbell, President of the National Builders' Supply Association has conferred with you on the matter of truck competition, we would have no objection to his attendance at the proposed meeting if he so desires, and you feel that his presence is necessary."[25]

When his attention was directed to this exhibit, Cole testified, however, that Campbell was neither invited nor did he attend the meeting and that Cole had never met Campbell.[26]

Several weeks later the CFA issued a call for a meeting between railroads and shippers to be held in Chicago, April 8, 1932.[27]

In preparation for the meeting it was arranged that each company would report the amount of cement trucked in 1931 and Cole testified that he either received or transmitted copies of letters showing these amounts.[28]

In Cole's correspondence before the meeting some opposition to his proposal was shown.

Guy, Universal Atlas' traffic manager, wrote Cole that he did not approve of requesting railroads to reduce short haul rates because there was no reasonable assurance that the railroads would increase their revenue. Guy said that since truck rates were unstable, as an alternative to reduction in the scale, he advocated that railroads merely

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[25] Com. Ex. 1765 A, B.

[26] Cole, Traffic Manager, Medusa (R) Tr. 40915.

[27] Resp. Ex. 3264: Morris, CFA Chairman to 31 companies, dated March 30, 1932, postponing the date of the meeting from April 7, 1932 to April 8, 1932. This was the only meeting: Cole, Traffic Manager, Medusa (R) Tr. 40945.

[28] Resp. Ex. 3265 A-C: Minutes of meeting, 4/8/32; Com. Exs. 1624, 1636, 1710 and 1708; Cole, *supra*, Tr. 40972-74, 41230.

attempt to meet truck rates.[29] In reply Cole agreed that truck rates were unstable and said:

> "* * * while I know that the suggested basis of rates will not eliminate trucking it will materially help and I understand the various cement companies in favor of the revision will also cooperate in a way that you are familiar with and I have no doubt that if the rates were put into effect trucking would be greatly reduced and carriers would receive the tonnage that formerly moved by truck." (Com. Ex. 1743 A-B)

As to the phrase about companies cooperating "in a way that you are familiar with", Cole testified that:

> "At that particular time there was quite a bit of agitation by the various shippers of all kinds of commodities, and the receivers of these commodities, as well as the railroads, to bring about better legislation, or, I should say, better regulation of trucking, particularly in the State of Ohio." (Tr. 40934-35)

In this letter Cole also suggested to Guy that if the latter would attend the proposed meeting with carriers some of his objections might be discussed to a point where a better understanding of the situation could be reached. Cole said he was encouraged by the favorable response of one-unit companies who in the past had been particularly favorable to trucking, and that suggestions that the new scale would be to the disadvantage of long-haul shippers were theoretical.[30]

Guy answered Cole and said he was willing to attend the meeting, saying that he felt if dealers sincerely wished to curtail trucking they should refrain from coming to the plants. He also said that if trucking could be curtailed without reducing railroad revenues, this should be at-

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[29] Resp. Ex. 3257; Letter dated February 15, 1932, Guy to Cole, Traffic Manager, Medusa.

[30] Com. Ex. 1743 A-B.

tempted first, because there would always be more cement shipped by rail than by truck. He suggested that an estimate be made of how much more tonnage under the new scale the railroads would have to receive in order to secure the same revenue.[31]

A letter from Marquette' Traffic Manager to Cole stated that he also disapproved the reduction. The writer pointed out that the reduced rate from Buffington into Chicago had not stopped trucking and that he did not think a reduction would have any effect on the Milwaukee situation either.[32]

In a letter to Kanengeiser, President of Superior, seeking to induce the latter to approve the proposed reduction, Cole wrote:

> "Our two Ohio plants will not benefit in any large consuming markets under the proposed rate revision up to 50 miles but if these rate reductions materially help in eliminating trucking, we feel that a great deal will have been accomplished for the cement shippers in the territory involved."[33]

When this language was called to his attention on the witness stand, Cole testified:

> "Now, do you say now, in the face of your own language in that letter, that you had no intention or thought of eliminating trucking in your rate reduction campaign? A. Absolutely I did not, Mr.

[31] Com. Ex. 1738: Letter dated Feb. 20, 1932.

[32] Com. Ex. 1731: Letter dated March 1, 1931, Tuttle (Marquette) to Cole, Traffic Manager, Medusa (R). It was stipulated that this letter was erroneously dated and the date should be read as 3/1/32 (Tr. 40[illegible]). Cole identified Waterbury and Scott, both mentioned in this letter, as being respectively traffic managers of Lehigh and Alpha; Cole, *supra* (Tr. 41281). On the witness stand Cole could not identify what was the Milwaukee situation to which the writer referred (Tr. 41281-82).

[33] Com. Ex. 1701 A-B: Letter dated March 28, 1932.

Wooden. I am a traffic manager, and I was only interested in getting short-haul rates reduced. I was trying to sell that man there an idea.

Q. And making misstatements in connection with it? A. I do not say they were misstatements; they were just sales argument.

Q. You do not say they were misstatements. They were not misstatements? A. I won't argue with you about that.

Q. Well—— A. The letter speaks for itself." (T. 41142)

Kanengeiser's reply indicated that he remained unconvinced,[34] and Cole again wrote:

"The principal reason for proposing this schedule of short-haul rates is to minimize trucking and if these rates will return to the carriers the tonnage that had been moving via trucks, each manufacturer will at least know what the rate is to these short-haul points, but when it moves via trucks it is just anybody's guess as to what the truck rate is."[35]

When questioned regarding his statement in this letter that the principal reason for the reduction was to minimize trucking, Cole testified:

"A. That is a statement I make in this paragraph, but your question to me is whether or not I wanted to eliminate trucking.

Q. All right. Now, you distinguish between minimizing and eliminating. A. Yes.

Q. In other words, you did want to minimize but you did not want to eliminate; is that it? A. I did not want to do either. That was an idea that I was trying to convey to Mr. Kanengeiser to go along on my proposition.

Q. You mean to say that it was not true? A. I was just giving him a sales argument.

[34] Com. Ex. 1678: Letter dated March 31, 1932.

[35] Com. Ex. 1675 A-B: Letter dated April 1, 1932.

Q. You mean to say that it was not true? A. I do not mean to say it was not true.

Q. All right, it was true, wasn't it? A. I mean to say that I was trying to convince Mr. Kanengeiser that if he would go along in this proposal there would be—trucking would be minimized. There is no question about that." (Tr. 41134).

Jennings, Secretary of Wabash, authorized Cole to represent Wabash at the April 8th meeting, saying that he believed the new rates:

"* * * will minimize if not altogether extinguish the trucking of cement from the various plants."[36]

Before he was shown the above letter, Cole testified as follows:

"Q. You have said that you had no intention of minimizing or completely ending trucking in your short-haul rate activities. A. That thought was never in my mind, Mr. Wooden. I was only concerned with securing reduced rates from our mills.

Q. Do you mean to say that you had no knowledge that other companies, your competitors, were not interested in minimizing or completely ending trucking?

* * *

A. I had no knowledge to that, to the best of my recollection." (Tr. 41276-77)

He was then shown the letter from Jennings and testified:

"Q. How do you explain your last statement that you had no knowledge of any competitors' intention to eliminate trucking with this statement here addressed to you? A. If you will recall my answer, I said to the best of my recollection. Now, you had that letter in front of you when you asked me that question. It is dated in 1932, about eight years ago.

[36] Com. Ex. 1708: Letter dated March 28, 1932.

If you had showed me that letter I would have had agreed that I did receive the letter.

Q. And that you did have some knowledge of what your competitors wanted to do about trucking? A. As far as that letter shows." (Tr. 41277-78)

and further:

"Q. To that extent you agree with Mr. Jennings that the proposed schedule would minimize the trucking of cement from the various plants? A. It would not, no; I would not say it would minimize it. It would reduce the tonnage somewhat. To what extent, it would just be a guess on my part." (Tr. 41280).

Cole was cross-examined as to the relationship between his efforts to reduce short haul rates and delivered prices. He testified:

"Q. Do you mean to say that you were not interested in the trucking problem, the trucking question, because of the difficulty in determining what delivered prices were with trucks taking delivery at the mill?

• • •

"The Witness: I never said that.

By Mr. Wooden:

Q. Do you now say it?

• • •

A. I was not concerned with delivered prices. My main sole object was to secure lower shipping rates for the Medusa Portland Cement Company.

By Mr. Wooden:

Q. You mean to say that you never knew that it was a problem agitating the cement industry—because the truck rates were not known and for that reason the delivered prices could not be accurately forecast?

• • •

A. That is correct, Mr. Wooden; I did not." (Tr. 41147-49)

His attention was then called to Com. Ex. 1675 B, his letter to Kanengeiser and the phrase, quoted above, that it is anybody's guess as to what the truck rate is while short haul rail rates would be known. He testified:

"A. Yes, sir, that is my statement.

Q. That was a fact? A. What was a fact?

Q. As you state it there? A. Why, yes, but it does not tie in with your question to me a moment ago. You talked about delivered prices. I am a traffic manager sitting on the sidelines trying to get lower shipping rates.

Q. You think delivered prices with anybody's guess as to what the rate is has no bearing on the delivered price; is that right?

• • •

A. As I say, I do not know anything about delivered prices. I was—in that letter I was speaking about short-haul rates. I wanted to secure lower shipping rates for our company. That was my main object.

By Mr. Wooden:

Q. You were also seeking to get a reduction, were you not, of short-haul rates throughout the whole Central Freight Association territory? A. No, sir, I was not. I was seeking for my own company.

Q. You mean to say that you were not seeking to get a reduction in territory beyond that in which your own company did business? A. Only my own company, that was all." (Tr. 41149-51)

John, President of Medusa, wrote Coogan, Vice President of Alpha, naming 13 companies which were in favor of the proposed revision of short haul rates. He urged that Alpha be represented at the meeting, saying:

"I feel that if the railroads agree to revise the short-haul rates it will materially help to eliminate the trucking of cement particularly in the territory

where it is such a factor in the marketing of cement, such as Western Pennsylvania, Western New York, Ohio, Michigan, Indiana and Illinois."[37]

3. The Short Haul Rate Meeting—April 8, 1932

This meeting was held at Chicago on April 8, 1932 "To consider Basis For Short Haul Rates On Cement Between Points in C.F.A., L.F.A. & W.T.L. Territories To Meet Motor Truck Competition". The report of the meeting lists 33 freight agents present representing 27 carriers and 26 traffic men representing 21 shippers.[1]

Cole testified that there were present

> "Practically all the traffic representatives of the cement companies in the Central Freight territory, and all of the railroad representatives of the lines serving the plant, together with the chairman, of course, of the Central Freight Association." (Tr. 40941-42)

The report of the proceedings at the meeting reads as follows:

> "Meeting convened pursuant to C.M. No. 3314 of March 30, 1932, and the question of revision of the present rates on short haul movements to meet truck competition was thoroughly discussed indicating a difference of opinion as between different shippers as to the necessity for revision at this time, and if revision were made, whether it would or could not be the means of restoring the traffic to rail movement.
>
> Some of the shippers filed or reported the extent to which trucking was indulged in within their territory, and arguments were presented both in favor of revision of rates and in objection thereto.
>
> In view of the fact that a unanimous proposition could not be submitted for the consideration of the

[37] Com. Ex. 1965 A-B: Letter dated March 28, 1932.

[1] Resp. Ex. 3265 A, B.

carriers, it was the consensus that the carriers at the earliest opportunity would reconvene to give consideration to the data and information which had been presented, and after such consideration would advise the shippers their conclusions.

With this understanding the conference adjourned." (Resp. Ex. 3265 B)

Cole testified about the meeting as follows:

"Q. Now, was any agreement reached between the shippers at that meeting concerning the short-haul rate problem? A. No, sir; there was not.

Q. Well, what was the result, if any, of this meeting? A. The majority favored the proposal, as I recall, but the objectors, particularly the Lehigh and the Universal representatives, were rather vigorous in their protests, and they cited various reasons why they did not feel that this proposal should be adopted." (Tr. 40965)

Further:

"Q. Which ones held out to the end against your proposal for short-haul rate reductions? A. The Lehigh Company, the Universal Atlas Company. They were the two largest companies that vigorously opposed my proposal at the hearing.

Q. And they did not change? A. No. As a matter of fact, they were so eloquent in their oratory there that they swung over a couple of my constituents, or whatever you want to call them." (Tr. 41229)

Cole made a record showing 18 producers favoring his proposal and 6 opposing it.[2]

The carriers finally tabled the proposed reduction at a meeting held May 3-6, 1932, and this action terminated the only attempt at a general revision of short-haul rates.[3]

[2] Com. Ex. 1043-5 G.

[3] Resp. Ex. 3277: Letter dated June 30, 1932, Cole to Morris, C.F.A. chairman; Cole (R) Tr. 40901, 40968.

4. Cole's Activities after the Meeting

On May 13, 1932 Cleveland, Vice President of the Chicago and Northwestern Railroad sent Cole, Medusa Traffic Manager, the following wire:

> "I HAVE HEARD FROM SEVERAL SOURCES THAT THE CEMENT INDUSTRY AS A WHOLE HAS CONCLUDED IN ORDER TO BE IN A POSITION TO KNOW THE COMPETITIVE SITUATION REGARDING TRANSPORTATION CHARGES THAT THE CEMENT COMPANIES WOULD DISCONTINUE TRUCKING AND THAT ALL CEMENT WOULD BE MOVED BY RAIL STOP ALTHOUGH THIS INFORMATION HAS REACHED ME FROM SEVERAL SOURCES I HAVE NOT HEARD ANYTHING DEFINITELY FROM YOUR COMPANY STOP WOULD APPRECIATE IT GREATLY IF YOU WOULD ADVISE BY WIRE AS TO WHETHER THIS IS ALSO YOUR POLICY PARTICULARLY AS REGARDS SHIPMENTS FROM DIXON AND MANITOWOC."[1]

Cole replied as follows:

> "YOURS DATE CEMENT INDUSTRY TRIED DISCOURAGE TRUCKING LAST YEAR WITHOUT SUCCESS OUR COMPANY AGREEABLE ELIMINATE TRUCKING IF OTHER COMPANIES DO. SITUATION WORSE IN CENTRAL TERRITORY CHAIRMAN MORRIS HAS COMPLETE DATA HIS FILE A EIGHTYFIVE DASH ONE DASH ELEVEN NINE NINE NETHERCOT ALSO ATTENDED JOINT MEETING CHICAGO APRIL EIGHT."[2]

Cole testified as follows:

> "Q. Mr. Cole, could you tell us what the basis was of your statement in your reply to Mr. Cleveland about what Medusa would do? A. Well, Mr. Withrow, I had in mind when I replied to Mr. Cleveland that during 1931 there was considerable trucking in Ohio, and it was not satisfactory to our operating people nor our management, in view of the fact that we did not have the facilities, the proper facilities, to take care of the trucking, and I was simply voicing my own opinion that we tried to discourage it, but we simply had to meet the competi-

[1] Com. Ex. 1600: Wire, Cleveland (Chicago Northwestern Railroad) to Cole.

[2] Com. Ex. 1599: Wire dated May 13, 1932, Cole to Cleveland.

tion or forego the business, and we did not want to forego the business." (Tr. 40977)

"Q. Mr. Cole, would you look at your telegram, Commission's Exhibit 159, and tell us what you had in mind when you stated the industry was trying to discourage trucking without success.

• • •

A. It went to my efforts with the railroads to secure rate reductions to short-haul points." (Tr. 40978-79)

On cross-examination Cole's wire was called to his attention and he testified:

"A. That is what I stated; it went to my efforts with the railroads to secure rate reductions in short-haul points.

By Mr. Wooden:

Q. And a few minutes ago you testified that you were not acting on behalf of the industry but entirely for the benefit and on behalf of the Medusa Company? A. That is correct, Mr. Wooden.

Q. Are both correct? A. No, sir.

Q. Which one is correct? A. I was acting on behalf of the Medusa Company to secure short-haul rates.

Q. Then, do you wish to retract your testimony on the page to which I called your attention? A. I am agreeable to let the record stand as it is." (Tr. 41175)

On January 16, 1933 Cole, in response to the request of Brennan, the New York Central Freight Traffic Manager Cleveland for a resume of progress in getting a comparable rail and truck rate,[3] wrote to Brennan in part as follows:

"The resume below will give you an idea of progress made in the effort by our company to eliminate trucking of cement.

During the early part of 1932, trucking was prohibited from our Bay Ridge, Ohio, plant beyond a

[3] Cole, Traffic Manager, Medusa (R) Tr. 40983-84.

forty mile zone which included Lorain and Richland Counties where we always did a very nice trucking business.

From our Silica, Ohio, plant we did not permit trucking beyond a fifty mile zone, although we did enjoy a nice tonnage from some accounts beyond the fifty mile zone."

Here follows a recital of a number of jobs lost by Medusa due to its policy against trucking.)

"The above will give you a good idea as to the amount of additional tonnage the railroads now enjoy in the State of Ohio due to the fact that the cement industry has succeeded in curtailing trucking. A similar condition prevails in the State of Pennsylvania.

At the present time, New York State has about five or six million dollars of construction work in the western part of the state on which bids are now being taken or will be taken very soon. All the cement for this work will in all probability move by rail, whereas if it had been let prior to December 15th, it would have been handled by truck.

All trucking of cement in the western part of New York was discontinued with the exception of Erie and Niagara counties, and in these two particular counties the trucking price is 5 cents per barrel over the car price. This same condition applies on shipments to Cuyahoga and Lucas counties in Ohio.

With the exceptions noted herein, and excepting the states of Michigan and Wisconsin, and Buffington to Chicago, all trucking of cement in Central and Trunk Line territory has been discontinued.

The cement industry has done very good work in its efforts to curtail trucking, particularly in view of the present high level of cement rates for distances up to 50 miles. This progress has been made without the aid of a general reduction in cement rates up to 50 miles, but the railroads should watch this situation closely and be prepared for prompt con-

certed action in the event the industry finds itself unable to keep the present situation in hand."[4]

Cole described this letter as a continuation of his efforts to secure short-haul rate reductions but nothing came of it.[5]

Cole was unable to state what he had in mind in his reference to the "very good work," of the cement industry in its efforts to curtail trucking,[6] nor could he say what he meant by his warning to the railroads to be prepared for "prompt" concerted action should "the industry find itself unable to keep the present situation in hand."[7]

Cole received several replies to his January 16th letter and other similar letters.[8]

A reply from Oliver, Pennsylvania Railroad executive is as follows:

> "I know you have been the backbone of this movement and I hope any sacrifices your Company has made have been more than offset by the return of the cement to the rails and the consequent stabilization of markets. It has been a great job for the railroads and the industry, and you know, of course, how much I appreciate it."[9]

As to this Cole testified:

> "Q. You do not know what he meant by 'stabilization of markets'? A. Oh, I might have a general understanding of what he means there.

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[4] Com. Ex. 1523 A-B: Cole to Railroad traffic executives of six railroads.

[5] Cole, Traffic Manager, Medusa (R) Tr. 40985-86.

[6] Id., Tr. 41210-11.

[7] Id., Tr. 41211-14.

[8] Com. Exs. 1512, 1518, 1521.

[9] Com. Ex. 1518: Oliver (Penn. R.R.) to Cole, 1/18/33.

Q. Well, what was it? A. Stabilization of markets to my mind would mean that it would have something to do with prices, I suppose.

Q. Yes. What consequent stabilization of prices or markets did you understand him to refer to? A. I really would not know, Mr. Wooden. I know nothing about prices, so I would not be able to answer your question.

Q. As an expert traffic man, do you say you cannot see any relation between stabilization of markets or prices and the curtailing of trucking?" (Tr. 41220)

* * *

A. Mr. Wooden, I, as traffic manager for the Medusa Company, am charged with the responsibility by my company to secure for them at all times on in and outbound shipments the lowest reasonable rates that I can obtain,—now, as to stabilization of markets, I simply cannot answer your question." (Tr. 41221)

J. Discontinuance by Producers.

1. December 1931: Western Pennsylvania and some Ohio Points

The following list shows the dates of announcement to customers of discontinuance of loading customers' trucks and the effective dates for companies operating mills in western Pennsylvania and in four cities in Ohio:

Note: The Effective Date is the day when the loading of trucks on spot business was discontinued.

Where contracts existed trucking continued until such contracts were completed. (Resp. Exs. 2519, 711, Com. Exs. 2822, 2658; Tr. 27791)

Mill	Announcement to Customers	Effective	
West Penn: West Winfield (Butler), Pa.		May — 1931	Tr. 27791; Com. Ex. 1043 G
Medusa: Wampum (Crescentdale), Pa.	Nov. 20, 1931	Dec. 1, 1931	Resp. Ex. 3190 Com. Ex. 2768
Universal Atlas: Universal, Pa.	Nov. 27, 1931	Dec. 1, 1931	Resp. Ex. 2519
Pittsburgh: Fultonham (E. Fultonham, Zanesville), Ohio	Nov. 28, 1931	Dec. 1, 1931	Com. Ex. 2822
Southwestern: Osborn, Ohio	May 4, 1931	May 4, 1931	Resp. Ex. 1777
	Discontinued to Dayton and Springfield, Ohio only.		
	Dec. 1, 1931	Dec. 1, 1931	Com. Ex. 2769
Diamond: Middle Branch, Ohio	Dec. 1, 1931	Dec. 1, 1931 into 8 counties	Com. Ex. 2658
Green Bag Pa.: Neville Island (Pittsburgh), Pa.		Dec. 1, 1931	Com. Ex. 1320, page 14
Lehigh: New Castle, Pa.		latter part of 1931	Tr. 26868-69
Alpha: Ironton, Ohio	Dec. 11, 1931	Dec. 12, 1931	Resp. Ex. 711, Com. Ex. 970-15 Q

Superior with its mill near Alpha's Ironton, Ohio mill did not discontinue trucking until April, 932 (see p. 1623, *infra*) and Green Bag, W. Va. with its mill at nearby Kenova, W. Va. discontinued at some date not shown in the record (see p. 1623, *infra*). Bessemer with its mill in western Pennsylvania also discontinued but again the date is not shown (see p. 1623, *infra*).

Reference is made to evidence already digested in Section H, *supra*, pp. 1530 to 1568 and particularly to the evidence relating to the activities of the Ohio Builders' Supply Association, pp. 1557-59, *supra*, the resolution of the Pittsburgh Builders Supply Club, p. 1560, *supra*, and the dealer, Holway's report to Eysmans of the Pennsylvania Railroad as to his contacts with manufacturers in Chicago in November, 1931, pp. 1564-65, *supra*.

There is evidence that as a result of activities of Ohio dealers, trucking into Youngstown, Ohio, by the mills that served that market, was discontinued in May, 1931.[1]

[In evidence is a Nickel Plate Railroad memorandum dated December 17, 1931 from Day to Williamson, Assistant Freight Traffic Manager, Nickel Plate Railroad, reading as follows:

> "Mr. Walter McAdoo has informed me from time to time about the activities of the Cement Association, their efforts being directed towards stabilizing the cement market, and this, of course, requires selling cement on a carload basis.
>
> He said that an agreement has been reached to quote in carload prices at markets in all large cities and practically the entire state of Ohio has been covered by the agreement. This should result in a return of the cement traffic to the railroads.

[1] Com. Ex. 1043 L; Letter dated May 28, 1931, Holway to Kinney, both of Ohio Builders Supply Association.

See also: Com. Ex. 1360 A-B, *supra*, p. 19 in which Bessemer was reported in a railroad interview to have been actively interested in the elimination of trucking in Youngstown.

I would suggest you get the full particulars from Mr. McAdoo and pass them on to our interested representatives." (Com. Ex. 1043-4 K)]

The McAdoo referred to was identified as a former Traffic Manager of Standard.[2]

[Another railroad document is a Pennsylvania Railroad memorandum dated December 30, 1931 from H. C. Oliver, Freight Traffic Manager, Pittsburgh, to J. B. Large, General Traffic Manager, Philadelphia, as follows:

"I am very glad to report that we have this morning unofficial advice to the effect that the cement manufacturers have agreed to stop trucking into the Cleveland District on and after January 1, 1932. This should return to the railroads at least 26,000 cars of cement which have been trucked during the past year." (Com. Ex. 1366)]

[A third railroad document is a letter dated January 11, 1932 from Williamson, of the Nickel Plate Railroad to Morris, Chairman, Central Freight Association, reading in part as follows:

[Italicized part quoted in Fdgs. Par. Eleven (f)]

"Cement producers in the entire State of Ohio, with the exception of the northern part of the State, have reached an agreement so far as concerns stabilization of prices, the result of which means that the movement of Cement by truck will be discontinued.

The producers in the northern part of the State, which will include Castalia and Toledo, O., have not as yet reached an agreement but it is hoped that they will do so shortly." (Com. Ex. 1043-4 V)]

On May 4, 1932, Meyers, Vice President, Green Bag, Pa. wrote to Morris, chairman, Central Freight Association, as follows:

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[2] Ingley, Secretary, Standard (C) Tr. 11568-69.

[Italicized part quoted in Fdgs. Par. Eleven (f)]

"We have just received a copy of Mr. Gubernator's letter of April 19th with regard to these short haul cement rates and particular attention has been called to the second paragraph on the second page of this letter, which refers to our shipments at Neville Island.

Undoubtedly Mr. Gubernator was of the opinion that trucking has been discontinued in this at Neville Island. It might be well for us to state concisely the facts for your information.

In November of last year we agreed to discontinue the trucking as of December 1st, at Neville Island, this agreement to continue until July 1, 1932 with the understanding that certain things be corrected in the meantime. Frankly, as yet none of these conditions has been corrected. We have given no assurance to anyone and as a matter of fact we have told the Operating Traffic Managers of the Railroads in the Pittsburgh District that the likelihood is that trucking will be resumed on July 1st under the present circumstances.

It is our judgment that trucking will proceed unless competitive rates of the railroads are reduced to meet the trucking competition. Whether the Railroads want this business or not depends upon their willingness to meet trucking competition. No arbitrary action can be depended upon to destroy economic conditions such as this and it is up to the Railroads to recognize it in this case. It depends upon your Committee action to a great extent as to just how much trucking of cement will be done in the Central Freight Association territory." (Com. Ex. 1043 B)

In a Pennsylvania Public Utilities Commission railroad rate hearing in April, 1936, Meyer testified as to discontinuance of trucking at Green Bag, Pa.'s Neville Island mill in Pittsburgh. He said he discussed with the railroads

"• • • whether our company were not entitled to some fair switching proposition which would take

into consideration the trucking and our geographic advantage, and after some discussion the railroads told me that they felt we were entitled to it, and that they were perfectly willing to sit down and discuss the matter, and if I could convince them of the situation that they would be in favor of putting such rates in.

Q. Upon that open declaration of principle, so to speak, in response to the demands of other cement companies what reply did you make to them? A. A great number of the cement companies I am frank to say, and I cannot list them because there are so many, were pressing us to discontinue the trucking of cement into the Pittsburgh district, which we absolutely refused up to that time to do. After the railroads had told me that they would sit down and work this thing out (p. 13) and talk it out, I talked to a number of the executives of the cement companies, not collectively, discussed the matter with them and told them what the railroads said they would do and asked them if they had any opposition to such a rate being put in, and in every instance they all agreed, they were not opposed, and would not oppose it, and some of them went so far as to say that we were entitled to it, and they would help us to get it.

Q. Upon that state of facts, what was the next development in the matter of the distribution of cement by your company? A. It then was up to me personally to decide what I should do, first with the railroads willing to sit down and the cement companies and executives I am referring to all told me that they were not opposed to it, I had one of two courses, to make the application and get my rates or proceed on the assumption that both parties were acting in good faith and discontinue the trucking so as to immediately improve these market conditions in the area which were in bad shape, and after weighing the thing without any agreement with anyone we on the 1st of December, 1931, discontinued trucking of cement except that which we were under contract to finish, and have not trucked since —pardon me, I will correct that, (p. 14) we trucked.

> two weeks ago a certain amount of cement because the railroads could not move it, they had too much water. (p. 15)" (Com. Ex. 1320, pp. 13-15)

In an I.C.C. hearing in November, 1937 Meyer testified that if called upon he would testify in identically the same language, "and I do so testify."[3]

McKee, Vice President, West Penn, testified that his company discontinued trucking in May, 1931 and denied that there was any agreement between his company and any others.[4] He denied knowledge of any agreement referred to in Meyer's letter to Morris dated May 4, 1932, *supra*, pp. 1593-94.[5]

Stone, Vice President, Universal Atlas, testified as follows as to the circumstances under which his company stopped trucking at its Universal, Pa. mill and at its Pittsburgh warehouse:

> "For some considerable period we had been receiving a great many requests to stop, from dealers, and a great many complaints from dealers about trucking. We had considered stopping for reasons that I have already mentioned in the earlier testimony, but primarily, right at that time, our main reason, I would say, was because of the importunities of dealers." (Tr. 35186)

He testified that he had received a letter dated August 17, 1931 from the Pittsburgh Supply Club stating that after December 1 the dealers would buy in carloads only, and said:

> "I remember specifically that we did receive it, and dealers were talking to me at one time, and I think one of those dealers—I have not looked at that list to refresh my recollection, but one at least

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[3] Com. Ex. 1319, p. 91.

[4] (R) Tr. 27797-98.

[5] (R) Tr. 27799-800.

> told me that the dealers were very, very fearful at that time, when they saw this packing plant of ours opening, plus warehouses of other competitors being put into Pittsburgh, that if you got the town dotted with manufacturers' warehouses, sooner or later it meant that it was going to put the dealers out of business, and the cement would be sold directly to the consumers." (Tr. 35188)

He further testified that Universal Atlas sent out its announcement after at least two competitors had sent out notices. He denied discussing the matter with competitors.[6]

Stone was shown Com. Ex. 1348 A, B, *supra*, pp. 1564-65, being letter dated November 23, 1931 from Holway to Eysmans in which Holway stated that he understood Universal and Basic (Green Bag, Pa.) would close their plants to trucks on December 1. Stone was asked if he had made any such statement to Holway. Stone answered:

> "No; and nobody in our organization had authority to make such a statement even if he had wanted to make it without consulting me." (Tr. 35213)

Dawson, Vice President, Medusa testified:

> "The warehouse was closed when Medusa found that its competitors had discontinued trucking in and around Pittsburgh. Medusa was glad to discontinue this warehouse because it was an added expense to Medusa and in 1931 Medusa was curtailing its activities as much as possible so as to economize." (Tr. 40037-38)

On behalf of Pittsburgh, Letzkus testified that his company did not enter into any agreement with competitors to discontinue trucking. The witness testified that he selected

[6] Stone, Vice President, Universal Atlas (R) Tr. 35189-90; Resp. Ex. 2519: Universal Atlas announcement.

November 29th to announce discontinuance of trucking effective December 1 because he was anxious to discontinue trucking and that as soon as he thought a competitor would discontinue trucking he was willing to follow. Counsel offered to prove through this witness and by a document that Pittsburgh had an agreement with the owner of its warehouse that it would pay no rent for the use of it until December 1, 1931.[7]

Executive officers of Lehigh and Alpha testified that trucking was discontinued from New Castle, Pa. and Ironton, Ohio mills and from Lehigh's Pittsburgh warehouse without any agreement or understanding with competitors. Both companies discontinued after learning that competitors had done likewise.[8]

An executive officer of Southwestern likewise denied any agreement not to truck cement from its Osborn, Ohio mill.[9]

2. June 1932: Five Mills in the Eastern West Virginia and Maryland Area

	Mill	Announcement to Customers	Effective	
Lehigh	Union Bridge, Md.	June 6, 1932	June 12, 1932	Resp. Ex. 708
	Fordwick, Va.		June 12, 1932	Resp. Ex. 1358
North American	Security, Md.	June 8, 1932	June 13, 1932	Resp. Ex. 709
Alpha	Manheim, W. Va.	June 10, 1932	June 15, 1932	Resp. Ex. 707 Com. Ex. 2809
Medusa	York, Pa.		June 15, 1932	Com. Ex. 970-11 Q

[7] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37862-63, 37999-8000, O.P. 37859-62.

[8] Bowen, Vice President, Lehigh (R) Tr. 26868-70.
Coogan, Vice President, Alpha (R) Tr. 23714-16.

[9] Warren, G. E., Vice President, Southwestern (R) Tr. 29135.

Lehigh's announcement to customers of discontinuance of deliveries to trucks at its Union Bridge, Md. mill, above, reads in part as follows:

> "Cement deliveries by truck from the cement mills have steadily demoralized dealers' markets. Such deliveries deprive the dealer of an important part of his business, which is to warehouse and deliver materials as the needs of his trade require. Where truck deliveries are made, the dealer has no reasonable assurance of protection in his market and is exposed to a constant breaking down of his retail prices.
>
> We believe that this method of delivery has proven unsound. Because a constructive step is needed, and in response to requests from many dealers in the territory surrounding our Union Bridge mill, we desire to announce that after June 11th, 1932, sales from this mill will be made entirely on a carload basis." (Resp. Ex. 708)

Bowen, Vice President, Lehigh testified that his best recollection was that deliveries to trucks [possibly under outstanding contracts] were made from North American's Security, Md. mill and from Medusa's York, Pa. mill for some time after discontinuance at Union Bridge and Fordwick, Va.[1] Bowen denied any agreement with competitors or any disclosure to competitors of the proposed step.[2]

North American's announcement to customers, above, reads in part as follows:

> "Deliveries of cement to trucks from our Security mill, in our opinion, has defeated one of the basic functions of the building material dealer. Consequently, in view thereof and also as a result of numerous requests from our dealers we will discontinue shipments by trucks at our Security mill." (Resp. Ex. 709)

[1] Bowen, Vice President, Lehigh (R) Tr. 26865.

[2] (R) Tr. 26893.

Porter, President, North American denied that this action was the result of any agreement with competitors[3] and testified as follows:

> "Well, we had had a good many complaints from dealers on trucking. I think I might sum it up by saying that trucking from the plants—we were in effect going into the retail business, and some of our dealers objected to that very strongly.
>
> Q. Did that present a serious problem to you or was it a problem that wasn't of any consequence? A. Well, it was a serious problem to us. The good will of our dealers is very important, and to the extent that some of our good customers objected to our permitting trucking, it was a serious matter to us." (Tr. 33844)

Further:

> "Q. Did your company eliminate trucking at your Security mill before anyone else eliminated trucking, or did you do it afterward or at the same time? A. Well, my recollection is that one of our—some of our competitors stopped trucking first, and that made it—what we felt made it possible for us to stop trucking." (Tr. 33845)

As to discontinuance by Alpha at its Manheim, W. Va. mill, Coogan, Vice President, denied that this was the result of any agreement with competitors[4] and testified:

> "We had no direct truck competition in that particular district. We did find that the mills to the east of us had discontinued trucking some time prior to that time.
>
> After we found that out we decided that inasmuch as trucking was costing us this money—or had thrown the cost up some, on the business at our mill, that we would discontinue trucking from that Manheim Mill." (Tr. 23703)

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[3] (R) Tr. 33845-46.

[4] (R) Tr. 23653, 23742.

3. August, 1932: Lehigh Valley and New York State Mills

Mill	Announcement to Customers	Effective	
Giant:			
Egypt, Pa.		July 29, 1932	Com. Ex. 969-10 Z
Hercules:			
Stockertown, Pa.		Aug. 1, 1932	Com. Exs. 1442 A, 969-10 i
Edison:			
New Village (Stewartsville), N. J.	July 29, 1932	Aug. 2, 1932	Com. Ex. 969-8 H
Keystone:			
Bath, Pa.	Aug. 2, 1932	Aug. 2, 1932	Resp. Ex. 1357, Com. Ex. 969-12 S
Universal Atlas:			
Northampton, Pa.		Aug. 2, 1932	Com. Ex. 968-4 H, Resp. Ex. 2502 B
Hudson, N. Y.		Aug. 2, 1932	Com. Ex. 968-4 Y, Resp. Ex. 2502 B
Allentown:			
Evansville, Pa.		Aug. 2, 1932	Com. Ex. 969-11 P
Valley Forge:			
West Conshocken (Swedeland), Pa.		Aug. 2, 1932	Com. Ex. 969-12 D
Coplay:			
Coplay, Pa.		Aug. 2, 1932	Com. Ex. 969-8 Y
Lawrence:			
Siegfried, Pa.		Aug. 2, 1932	Com. Ex. 969-6 P

Mill	Announcement to Customers	Effective	
Vulcanite: Vulcanite (Phillipsburg), N. J.		Aug. 2, 1932	Com. Ex. 969-7.R
Lawrence: Thomaston (Rockland), Me.		Aug. 2, 1932	Com. Ex. 969-7 F
Nazareth: Nazareth, Pa.		Aug. 2, 1932	Com. Ex. 969-9 o
Lehigh: Foglesville, Pa.	July 28, 1932	Aug. 3, 1932	Resp. Ex. 706, Com. Ex. 2773
Ormrod, Pa.	July 28, 1932	Aug. 3, 1932	Resp. Ex. 706, Com. Ex. 2773
West Coplay, Pa.	July 28, 1932	Aug. 3, 1932	Resp. Ex. 706, Com. Ex. 2773
Bath, Pa.	July 28, 1932	Aug. 3, 1932	Resp. Ex. 706, Com. Ex. 2773
Sandt's Eddy, Pa.	July 28, 1932	Aug. 3, 1932	Resp. Ex. 706, Com. Ex. 2773
Alpha: Martin's Creek, Pa.	July 30, 1932	Aug. 3, 1932	Com. Exs. 2810, 968-8 i
Cementon (Catskill), N. Y.	July 30, 1932	Aug. 3, 1932	Com. Exs. 2810, 969-2 F
Jamesville, N. Y.	July 30, 1932	Aug. 3, 1932	Com. Exs. 2810, 968-10 H
Penn-Dixie: Nazareth, Pa.		Aug. 3, 1932	Tr. 38151, Com. Ex. 968-5 P
Penn Allen, Pa.		Aug. 3, 1932	Tr. 38151

Mill	Announcement to Customers	Effective	
Bath, Pa.		Aug. 3, 1932	Tr. 38151, Com. Ex. 968-6 F
Portland Point, N. Y.		Aug. 3, 1932	Tr. 38151, Com. Ex. 968-6 X
Lone Star: Hudson (Hudson Upper), N. Y.	July 29, 1932	Aug. 4, 1932	Com. Ex. 969-3 V, Resp. Ex. 1360, Com. Ex. 1115 A
Nazareth, Pa.		Aug. 4, 1932	Com. Ex. 969-3 E
North American: Howes Cave, N. Y.	Aug. 2, 1932	Aug. 5, 1932	Resp. Ex. 2399
Catskill, N. Y.	Aug. 2, 1932	Aug. 5, 1932	Resp. Ex. 2399
Glens Falls: Glens Falls, N. Y.		Aug. 11, 1932	Com. Ex. 969-13 Y
Whitehall: Northampton (Cementon), Pa.		Never trucked to any amount with exception of small lots, local business	Tr. 28542

Delivery To Trucks Not Discontinued from the Following:

Huron	Oswego, N. Y.	packing plant	Tr. 33439
	Buffalo, N. Y.	packing plant	Tr. 11279, 11370
Lehigh	Oswego, N. Y.	warehouse	Tr. 26882.
Universal Atlas	Oswego, N. Y.	warehouse	Tr. 35177
Federal	Buffalo, N. Y. (Hamburg, Lackawanna)	mill	Tr. 30628-29, 30656, 30782
Great Lakes (Lehigh)	Buffalo, N. Y.	mill	Tr. 26877-78

The foregoing chronological list shows that Lehigh on July 28, 1932 was the first producer in this area to announce discontinuance of delivery to customers' trucks at its mills. The circumstances which lead Lehigh to take this step are described in the testimony of Bowen, Vice President, as follows:

About 1927, Valley Forge constructed a mill at West Conshohocken, located on the outskirts of Philadelphia. Within a few months after the plant began operating, sales were made to customers' trucks at f.o.b. mill prices. Lehigh immediately began to lose business to buyers who took advantage of the opportunity to make purchases in small quantities in truck load lots.[1] Other Lehigh Valley mills suffered the same experience.[2] Lehigh, unable to meet this service from its Lehigh Valley mill, finally, in May 1931, established a warehouse at Conshohocken to protect their very substantial Philadelphia business.[3] Hercules countered the Lehigh move on June 3, 1931 by using Valley Forge henceforth as a basing point with a subsequent reduction in Philadelphia prices.[4]

This competitive condition lasted more than a year until Lehigh was informed that the Pennsylvania and the Reading railroads had completed negotiations with Valley Forge to the end that the latter company would eliminate deliveries to trucks if the railroad would reduce rates for short distances around the Valley Forge mill.[5] When

[1] Bowen, Vice President, Lehigh (R) Tr. 26853-56.

[2] Lone Star: See Com. Exs. 969-3 H; 971-9 L; 963 H.
Universal Atlas: See Com. Ex. 968-4 J.

[3] See note 1, *supra*.

[4] Com. Exs. 969-10 o; 971-9 B-C. In its reply to the Burns-Clark Questionnaire, Valley Forge did not acknowledge that it had been made a base. Com. Exs. 969-12 M; 971-30 J.

[5] Bowen, *supra*, Tr. 26857-58. Lehigh had not attempted to obtain reduced rates from the Lehigh Valley to Philadelphia because this would necessitate a complete over-hauling of the eastern territory rate structure. Tr. 26856-57.

Lehigh learned the terms of the proposed arrangement between Valley Forge and the railroads, it notified the railroads that it would not oppose the short haul reductions, and the arrangement went through.[6]

The elimination of trucking from Valley Forge removed the necessity of Lehigh's Conshohocken warehouse. It was closed and the announcement of July 28, 1932 was sent out to the trade.[7] This announcement is in substantially the same language as its announcement dated June 6, 1932, quoted above, at Lehigh's Union Bridge, Maryland, mill. As to this Bowen testified:

> "When we were informed by the railroad companies that the Valley Forge Mill would discontinue trucking, we, of course, were glad to close our Conshohocken warehouse, and it seemed to us from consideration of all of the conditions in the market that the time was ripe for us to eliminate trucking entirely from our Lehigh Valley mills.
>
> We had been going through a long and protracted price war which had brought prices to such low levels that we were losing money very severely, and we knew that our competitors were losing money at least as badly——
>
> Mr. MacIntyre: If your Honor please——
>
> A. (Resumed) —our——
>
> Mr. Leisure: Let him finish, please.
>
> Trial Examiner Norwood: Let him finish his answer.
>
> A. (Resumed) We sent out announcements that we would discontinue trucking, and that we would increase our prices by 19 cents per barrel. We had made no secret of the fact that we thought that price cutting through trucking and unfair treatment

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In a statement made to Professors Clark and Burns prior to the institution of the present proceeding, Valley Forge confirmed the gist of Bowen's testimony by stating that the immediate reason for discontinuing trucking was the reduction of freight rates. Com. Ex. 969-12 D.

[6] Bowen, Vice President, Lehigh (R) Tr. 26857-58.

[7] Id., Tr. 26857-59.

of dealers through trucking stood in the way of any possibility of getting decent prices in the Lehigh Valley territory.

Our move in July of 1932 was in the nature of giving the industry in the Lehigh Valley an opportunity, which they might take advantage of if they saw fit, to restore prices in that territory to the levels which would at least partly reduce losses and at the same time accord fair and honest treatment to the dealers in the territory." (Tr. 26858-59)

And further:

"Q. After these announcements were issued by your company, what did your competitors do, if anything, Mr. Bowen? A. Within a comparatively short time our competitors met our advance in prices and also met our action in discontinuing trucking in the Lehigh Valley territory." (Tr. 26861)

Lehigh's announcement, as shown by the chronological list above, was followed by similar action on the part of almost all competitors in the Lehigh Valley and in New York State. Executives of almost all of these companies testified that when their companies announced discontinuance of trucking they were following the lead of Lehigh and other competitors and expressly denied that the action taken was the result of any agreement, understanding or discussion with competitors.[8]

[8] Alpha: Coogan, Vice President (R) Tr. 23693-95, 23653.
Edison: Sweeney, Vice President (R) Tr. 35677, 35683.
Hercules: Brobston, President (R) Tr. 26183-84.
Keystone: Scott, H. M., President (R) Tr. 27362-67, 27375-76. See also Resp. Exs. 1359-1360, 1365.
Lawrence: Ackerman, Vice President (R) Tr. 31343-44; 31278.
Lone Star: Hogan, President (R) Tr. 34556, 34671; Koch, Vice President (R) Tr. 32866.
Nazareth: Robeson, Vice President (R) Tr. 28136-38.
North American: Porter, President (R) Tr. 33845-46.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38151-52.
Universal Atlas: Stone, Vice President (R) Tr. 35153-54, (C) 461-62, 464-66.
Whitehall: Elliott, Vice President (R) Tr. 28544.

4. The Southern States: District 6

Mill	Announcement to Customers	Effective	
Lone Star: New Orleans, La.	Feb. 25, 1928	March 1, 1928	Resp. Ex. 2356 Tr. 32852-53
Penn-Dixie: Kingsport, Tenn.		July 31, 1932	Tr. 38151
Richard City, Tenn.		July 31, 1932	Tr. 38151
Clinchfield, Ga.		July 31, 1932	Tr. 38151
Signal Mountain: Chattanooga, Tenn.		Aug. 1, 1932	Com. Ex. 975-12 Z
Cumberland: Cowan, Tenn.	Aug. 10, 1932	Aug. 15, 1932	Resp. Ex. 3061
Lone Star: Norfolk (South Norfolk), Va.	Aug. 13, 1932	Aug. 17, 1932	Com. Ex. 1115 B
Hermitage: Nashville, Tenn.	Feb. 1, 1933 but continued) to truck small) lots)	Feb. 11, 1933	Resp. Ex. 2661 Tr. 36182-83 Resp. Ex. 2669
National: Ragland, Ala.	latter part of 1935		Tr. 39582

Never Any Trucking From:

Lone Star: Spocari, Ala.	Com. Ex. 975-4 Z Tr. 32856
No. Birmingham, Ala.	Com. Ex. 975-5 P Tr. 32854, 33142
Universal Atlas: Leeds, Ala.	Com. Ex. 975-12 G
Florida: Tampa, Fla.	Com. Ex. 975-13 o
Alpha: Birmingham (Phoenixville), Ala.	Com. Ex. 976-9 B Tr. 24758-59
Lehigh: Boyles (Birmingham), Ala.	Com. Ex. 975-11 M Tr. 26891

Trucking Never Discontinued From:

Volunteer: Caswell (Knoxville), Tenn.	Resp. Ex. 2193 Com. Ex. 976-10 I Tr. 31461-62, 31470
Southern States: Rockmart, Ga.	Tr. 37547-49, 37610
Georgia: Portland, Ga.	Com. Ex. 975-1 D

In this District Penn Dixie took the lead when it discontinued making deliveries to customers' trucks at its two Tennessee mills and at its Georgia mill on July 31, 1932.[1] This was three days before similar action was taken by it at its Lehigh Valley and New York mills.

Both Cumberland and Signal Mountain with mills at Cowan and Chattanooga, Tenn. respectively discontinued shortly after Penn Dixie discontinued at its nearby Richard City mill, see above. Pearson, Secretary-Treasurer

[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38151.

of Cumberland, denied that this was the result of any agreement with competitors and had this to say:

> "As I stated in an earlier question, when we first began trucking, it was just one or two nearby individuals wanted less than a carload of cement, and we sold it to them not realizing what it might lead to as the demand for that trucking privilege increased, and did increase, we found that we were greatly handicapped at our packing house because of the introduction of trucks for which we were not equipped to load with our regular railroad loading operations. We ran into other difficulties. I recall customers at one point who would be billed at destination might drop off the cement at a nearby point where we had a good dealer who was receiving rail shipments, and did not care to truck. He would make sale of the cement which he had bought from us, with the intention, we supposed, of it going to the destination at which we had billed it, sold it in the nearby area, and disrupted the retail market of our dealer, therefore our friendly dealers raised complaint about it. We were glad to get rid of trucking." (Tr. 39843-44)

Hermitage's action some six months later was taken without any communication, understanding or agreement with competitors but was based chiefly on salesmen's reports showing complaints of dealers and some refusals of dealers to buy from Hermitage because of its trucking policy.[2]

National's action in the latter part of 1935 was merely discontinuance of delivery to trucks of dealers in St. Claire County in which the mill is located. This action was taken on National's initiative and without any agreement or understanding with competitors.[3]

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[2] McGovern, Sales Manager, Hermitage (R) Tr. 36176, 36179-80. Resp. Exs. 2665-2668.

[3] Dannelly, Vice President, National (R) Tr. 39580-82.

5. Texas: District 9

Mill	Effective	
Lone Star:	Mar. 1, 1926	Com. Ex. 976-1 D
Manchester Switch (Houston), Texas		
Harrys (Dallas), Texas	Mar. 1, 1926	Com. Ex. 976-13 Y
Trinity:	Mar. 1, 1926	Com. Ex. 976-13 K
Dallas (Eagle Ford), Texas	Trucking by company controlled trucks	
Houston, Texas	Spring 1931	Com. Ex. 967-17 G
	Four months after Lone Star	Tr. 32851
Republic: Longhorn (San Antonio), Texas	April 18, 1933	Com. Ex. 976-2 S

Never Any Trucking From:

Trinity: Fort Worth, Texas	Com. Exs. 967-18 A, 2374
Universal Atlas: Waco (Atco), Texas	Tr. 35150 Com. Ex. 967-11 A

Trucking Never Discontinued From:

Southwestern: El Paso, Texas	Resp. Exs. 2974-2976 Tr. 38908
San Antonio: Cementville (San Antonio), Texas	

The dates shown above are taken from answers to the Burns Clark Questionnaire. The recollection of Koch, Vice President, Lone Star, does not conform to those dates. His testimony as to the situation at Lone Star's Houston mill is as follows:

> "Now, at Houston was a condition in which we were doing no trucking, or making few, if any, deliveries to trucks when they called at our mill, until 1927 when the Trinity Portland erected a mill several miles closer to the heart of Houston, and they gave notice that they would deliver to trucks at a mill price, or mill base, or would ship in carlots any place in the city at 10 cents higher than that price." (Tr. 32846-47)

Further:

> "A. When this competing mill was established they opened it to trucking. They were that much closer to the business part of town. We met it, not by trucking it from our plant, but by opening up of a city warehouse. We switched our cars by railroad up to that warehouse, and we equalled the condition that had been created. That was in 1927.
>
> In 1928 the Houston dealers approached us and wanted us to cease trucking. We contended that we had not started. However, to see whether or not they would continue to give us business, we sent out notice and stopped trucking. Some four months later the Trinity Company sent out notice that they also ceased trucking." (Tr. 32850-51)

As to the situation at Dallas, he testified:

> "A. When I came to Dallas in 1918 I found that the company owned one 2½-ton truck in which we offered to make deliveries for 10 cents a barrel in certain parts of the city. There wasn't much cement that moved that way then; but in 1920 there was both a car shortage and an oil boom that clogged the rails of the T. & P. Railroad which served us, so that we either could not get enough cars to load

or if we did get them the railroad could not move them." (Tr. 32842)

"Therefore we offered the trade to load their trucks if they would come to the mill, or we would employ trucks, if possible, to take cement from our mill to the team tracks in the City of Dallas and load cars.

From thence on we delivered to trucks calling at our mill and continued to do that up until about 1927 or '28, at which time we employed a trucking company to do all the trucking. That continued up to '32 or '32, when the State Legislature of Texas enacted a law that limited the size of the truckloads to 7,000 pounds, whereas they had been hauling 14,000 pounds before.

'The trucking company, naturally—or, the trucking company demanded additional compensation, so that we discontinued the trucking entirely, the car movement into the city being the cheaper and the most desirable." (Tr. 32844-45)

Further:

"Q. And as a result of the situation which you said occurred in 1927 or 1928, did you terminate trucking? A. It finally terminated trucking, yes; but I think it was '32 or '31 at Dallas." (Tr. 32846)

"A. Well, when we ceased delivering to trucks our competition also ceased, and there has been no trucking since.

Trial Examiner Norwood: About what time was that?

The Witness: Dallas?

Trial Examiner Norwood: Yes.

The Witness: Houston was 1929. My best recollection is that Dallas was 1931." (Tr. 32852)

There is evidence that the announced policies of refusal to serve customers' trucks were often evaded.[4] A Universal Atlas salesman reported to his Houston office that:

[4] See Com. Exs. 2433 and 2375, 1940, 1941.

"Yesterday called on George Hamman. They have been trucking from Houston plants.

You know M L Cashion reported they sent their trucks by the plant for cement.

I thought this wasn't in the rule book.

Bingham" (Com. Ex. 1941)

The Houston office reported the situation as follows:

"Bingham reports two oil companies informed him they send their trucks to the Houston plants and obtained cement.

It has been our opinion, based on considerable investigation, that no trucking was done in Texas.

We want you to dig into this and find out all you possibly can about it.

You may find that the dealers are buying a car of cement, the plants are loading the car and shoving it over on a side track and that the trucking is being done from the loaded car.

So far as we can see there is nothing wrong with this procedure so long as sale is not made of less than a car and so long as the cement is trucked from the car and not from the plant itself." (Com. Ex. 1940)

Southwestern's El Paso mill is located far to the west of the other Texas mills. In 1929 it was making deliveries to customers' trucks only in emergencies.[5] Later all deliveries were discouraged.[6] W. R. Blair, Sales Manager of this mill put it this way:

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[5] Com. Ex. 1276: Southwestern Interoffice memo. dated April 13, 1929, W. R. Blair, Sales Manager (El Paso), Southwestern (R) to Merrill, Vice President, Southwestern.

[6] Resp. Ex. 2970: Southwestern announcement dated 1/27/36 signed by Blair.
W. R. Blair (*supra*), Tr. 38908.

"A. We have tried to discourage it from the standpoint of the danger and risk involved, but we have never refused to do it.

Q. Now, has this always been your practice to discourage dealers from trucking? A. Ever since I have been in the office, yes, and saw the condition that exists at the plant.

Q. Has this practice of yours at El Paso concerning discouraging the trucking of cement been the result of any understanding or agreement with your competitors? A. No, sir." (Tr. 38908)

Further:

"Q. Now, you have testified, Mr. Blair, that you have discouraged the loading of, or selling of cement for loading to dealers' trucks at your mill. A. Yes, sir.

Q. How have you discouraged it? A. We have told them that we did not want any more of that business than was absolutely necessary; some of them we have refused to load. We have tried to add premiums, we tried to accommodate some of them; we have to do it in certain territories to meet competition, but in every way we try to limit the amount that we ship by truck until we have—we feel that there is enough business in the territory to justify us equipping our plant for truck loading." (Tr. 39339)

6. Middle West Mills: Districts 5 and 7

Mill	Announcement to Customers	Effective	
Alpha: St. Louis, Mo.		Dec. 12, 1931	Com. Ex. 975-4 B
Penn-Dixie: West Des Moines (Valley Jct.), Iowa	Apr. 5, 1932	Apr. 10, 1932	Tr. 38151; Com. Ex. 576-5 T
Hawkeye: Des Moines, Iowa	Apr. 5, 1932	Apr. 11, 1932	Com. Ex. 576-5 S
Universal Atlas: Hannibal, Mo.		Apr. 25, 1932	Com. Ex. 975-1 P
Alpha: La Salle, Ill.		Aug. 3, 1932	Com. Ex. 975-19 R
Medusa: Dixon, Ill.		Sept. 9, 1932	Com. Ex. 975-17 C
Dewey: Linwood (Davenport), Iowa		Sept. 9, 1932 Have sold to trucks since 1927 when plant built.	Com. Ex. 976-3 i Tr. 46642-43
Lone Star: Limedale (Green Castle), Ind.		Oct. 20 or 22, 1932	Com. Exs. 975-17 T, 1123 A
Louisville: Speed, Ind.		Oct. 24, 1932	Com. Ex. 975-18 o
Lehigh: Mitchell, Ind.		Soon after Speeds	Tr. 26885-86
Kosmos: Kosmosdale, Ky.		Jan. 1, 1933	Com. Ex. 970-1 D
Missouri: Prospect Hill (St. Louis)		Date not shown	Tr. 37130

Never Any Trucking From:

Lehigh:	
Oglesby, Ill.	Tr. 26891
Mason City, Iowa	Tr. 26891
Northwestern State:	
Mason City, Iowa	Com. Ex. 975-2 F Tr. 36486
Marquette:	
La Salle (Oglesby), Ill.	Tr. 13967
Cape Girardeau (Marquette), Mo.	Com. Ex. 1043 o

No Evidence of Discontinuance of Trucking From:

Universal Atlas:	
Duluth, Minn.	Tr. 35154-55
Buffington, Ind.	Com. Ex. 1203 TT
South Dakota State Cement Plant:	
Rapid City, S. D.	Tr. 41534
Medusa:	
Manitowoc, Wisc.	Resp. Exs. 3325-26
Wabash:	
Stroh, Ind.	
Northwestern States:	
Gilmore City, Iowa	Tr. 36486, 36475

Browder, Traffic Manager, Penn-Dixie, testified that Penn-Dixie took the initiative in announcing discontinuance of trucking at its west Des Moines mill and denied that this action was the result of any agreement or understanding with competitors.[1] Manley, General Manager, Hawkeye, denied that the action of Hawkeye was the result of any agreement or understanding with competitors and summed up the reasons given by him for discontinuance as "the

[1] (R) Tr. 38151-52.

number of complaints from dealers and the annoyance and extra expense attached to sales for truck delivery."[2]

As to the four mills at La Salle, Oglesby and Dixon, Ill., there was never any trucking from two of them, as shown above and Alpha is reported as having discontinued deliveries to trucks on August 3, 1932. This is the same as the date on which trucking was discontinued at Alpha's Lehigh Valley mills, *supra*, p. 1602. Coogan, Vice President, Alpha, testified, however, that "we have never made any truck deliveries from our mill located at La Salle, Ill."[3] As shown by the list above Medusa discontinued at its Dixon mill on Sept. 9, 1932.

Dewey is listed above as having discontinued trucking at its Linwood (Davenport) Iowa mill on the same date, Sept. 9, 1932. The testimony of two officers of Dewey is in conflict and the identification of the document from which this date is taken (Dewey's answer to the Burns Clark questionnaire) is in doubt.

Capen, Vice President and Sales Manager of the Linwood (Davenport) mill since 1927,[4] testified as follows:

> "A. We did ship cement by truck, our Davenport plant, and we discontinued it.
>
> Q. When did you discontinue it? A. I don't remember.
>
> Q. Could you say about when? A. No, sir; I couldn't. It is a matter of two or three years or four years. I don't remember.
>
> Q. Was it as long ago as 1932? A. I couldn't say that." (Tr. 12706)

Further:

> "Q. Wasn't one of the reasons you discontinued trucking because it had this disturbing effect on the

[2] (R) Tr. 41626-28.

[3] (R) Tr. 23645.

[4] (C) Tr. 12664.

destination prices that you mentioned? A. I would say that was one of the reasons in the tri-cities.

Q. Tri-cities? You mean by that—— A. Rock Island, Moline, and Davenport.

Q. What were the reasons that led you to initiate the loading of cement by trucks at your plant? A. Well, that was the policy that Mr. Tyler told me to adopt when the plant started shipping cement at Davenport. I had never been in the cement business before that date and I didn't question the whys, in 1927." (Tr. 12708)

R. W. Moore, who started as Traffic Manager in 1912 and is now Vice President, Secretary, General Counsel, Traffic Manager, Fuel Purchasing Agent and a Director[5] testified that Dewey has made sales to trucks at this mill ever since it was built in 1927.[6]

He testified:

"A. When the Davenport plant started to operate we delivered cement to trucks at the plant whenever it was called for. After that situation had been in effect for a number of years the Government issued restrictions limiting the load limit on the Government bridge across the Mississippi River between Davenport and Rock Island, which cut off the use of that bridge for trucks handling sizable quantities of cement, and then at about the same time the City of Davenport passed an ordinance which restricted the size and limits of trucks that could operate in the city, and that had the effect of cutting off the movement into the tri-cities district, which was the principal market to which they were trucking. Trucks did continue to come to the plant after that, however, from destinations west, and they were loaded, priced the same way as at Dewey." (Tr. 46659-60)

[5] (R) Tr. 46633-34.

[6] Id. Tr. 46642-43, 47224.

The load restrictions on the Government bridge were imposed September 6, 1932[7] and the Davenport ordinance was adopted a few months before that.[8]

As to this ordinance, Moore testified:

> "Trial Examiner Norwood: Now, was that such a limitation as discouraged the trucking at that place?
>
> The Witness: Oh, yes, yes, sir. And then other things in the ordinance, such as the rate of speed that they could operate interfered." (Tr. 46666)

Moore denied that Dewey had ever placed any restrictions upon trucking from its mill and denied that Dewey had taken any action pursuant to any agreement or understanding with competitors.[9]

Moore was unable to identify Dewey's answers to the Burns Clark questionnaire[10] and when his attention was directed to Com. Ex. 976-3 i (cited in the list above as showing discontinuance on Sept. 9, 1932) he testified that there was no change in company policy as to trucking on Sept. 9, 1932. Dewey continued to serve trucks.[11]

7. March, 1933: Gas Belt Mills, District 8

Mill	Effective	
Lone Star:		
Bonner Spgs., Kans.	March 25, 1933	Com. Ex. 967-16 M
Dewey:		
Dewey, Okla.	(March 25, 1933	Com. Ex. 1123 D
	(March 31, 1933	Com. Ex. 976-11 E

[7] Resp. Ex. 3590.

[8] Moore, R. W., Vice President, Dewey (R) Tr. 46665.

[9] Id., Tr. 46666-67.

[10] Id., Tr. 46952-59, 47425-33.

[11] Id., Tr. 47241-42.

Mill	Effective	
Missouri:		
Sugar Creek, (Kansas City), Mo.	March 27, 1933	Com. Ex. 1123 D
Universal Atlas:		
Independence, Kan.	(March 27, 1933	Com. Ex. 967-15 B
	(March 28, 1933	Com. Ex. 1123 D
Ash Grove:		
Louisville, Neb.	(March 27, 1933	Com. Ex. 1123 D
	(March 30, 1933	Com. Ex. 976-7 P
Ash Grove:		
Chanute, Kan.	(March 27, 1933	Com. Ex. 1123 D
	(April 6, 1933	Com. Ex. 976-6 X
Lehigh:		
Iola, Kan.	March 28, 1933	Com. Ex. 1123 D
Monarch:		
Humboldt, Kan.	March 29, 1933	Com. Exs. 976-8 K, 1123 D
Nebraska:		
Superior, Neb.	(March 30, 1933	Com. Ex. 976-4 L
	(March 31, 1933	Com. Ex. 1123 D
Consolidated:		
Fredonia, Kan.	March 31, 1933	Com. Ex. 976-5 J
Oklahoma:		
Ada, Okla.	No date shown	Tr. 13406
Arkansas:		
Okay Jct., Ark.	No evidence of discontinuance	

It appears that Dewey is listed as among the first mills in this area to discontinue serving trucks. Again, there is conflict in the evidence. An F.T.C. investigator testified that Tyler, President of Dewey, when interviewed in November, 1936 said that two or three years prior to the interview sales to trucks had been discontinued.[1] Reiter tes-

[1] Bass, Attorney-Examiner, F.T.C. (C) Tr. 13393.

tified that when he was Chairman of the Cement Code Authority there was no filing of truck prices for the Dewey plant in Oklahoma during the time such prices were being filed.[2] On the other hand, R. W. Moore, Vice President, Dewey, testified that sales have been made continuously to trucks from the Dewey, Oklahoma plant for the past twenty-eight years.[3] Moore questioned the authenticity of the statements in the purported answer of Dewey to the Burns-Clark questionnaire that trucking had been discontinued on March 31, 1933.[4] He explained, however, that in 1929 and 1933 the Oklahoma legislature enacted laws which tended to curb trucking even though Dewey assisted customers arrested on the highways for violating these license laws.[5]

As to the effect of these laws, Moore testified:

> "Trial Examiner Norwood: Then, after these laws, tell us what was the net result, did the trucking fall off, that is, the application for trucking?
>
> The Witness: Well, yes, they quit sending their trucks.
>
> Trial Examiner Norwood: They just quit sending?
>
> The Witness: Yes." (Tr. 46659)

Moore said that at the time Oklahoma enacted this legislation none of Dewey's competitors had ceased trucking and that Dewey had no agreement of any kind with competitors to interfere with trucking.[6]

Executives of Ash Grove, Lehigh, Missouri, Monarch, Nebraska, Lone Star and Universal Atlas all testified that their respective decisions to discontinue serving trucks at

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[2] (C) Tr. 4179-80.

[3] (R) Tr. 46642, 47228.

[4] Id., Tr. 47237-40.

[5] Id., Tr. 46647-48, 46657-59.

[6] Id., Tr. 46667.

their mills were not the result of any agreement or understanding with competitors.[7]

8. District 10 & Some Mills in District 3

There is no evidence that delivery to customers' trucks was discontinued at any of the eight mills in District 10. In fact, there is evidence that at four mills deliveries to trucks were being made in April 1938, as follows:

Three Forks:	
Trident, Mont.	Com. Ex. 2748 (1-19)
Idaho:	
Inkom, Idaho	Com. Ex. 2695 (1-61, 63-90)
Union:	
Devils Slide, Utah	Com. Ex. 2750 (3, 4, 6, 19, 20, 24-48, 57, 60-89)
Monolith-Midwest:	
Laramie, Wyo.	Com. Ex. 2722 (1, 2, 38, 40)

Five mills in District 3, in addition to those listed, *supra*, p. 1591, discontinued trucking but at later dates and in the case of two no date is shown:

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[7] Ash Grove: Sunderland, President (R) Tr. 47633.
Lehigh: Bowen, Vice President (R) Tr. 26893.
Lone Star: Hogan, President (R) Tr. 34556; Koch, Vice President (R) Tr. 32866.
Missouri: Alexander, President (R) Tr. 37131, 37133.
Monarch: Brooke, Vice President (R) Tr. 42199.
Nebraska: Hoenig, Sales Manager (R) Tr. 42046.
Universal Atlas: Affleck, President (R) Tr. 34909.

Mill	Effective	
Superior:		
Superior, Ohio	April 1932	Com. Ex. 970-5 H
Medusa:		
Bay Bridge (Sandusky), Ohio	Oct. 4, 1932	Com. Ex. 970-13 R except to Cuyahoga & Lucas Cos.
Castalia:		
Castalia, Ohio	Dec. — 1932	Com. Ex. 970-4 L
Bessemer:		
Bessemer (Walford), Pa.	No date shown	Tr. 32283-84
Green Bag W. Va.:		
Kenova, W. Va.	No date shown	Tr. 29881-82

No Evidence of Discontinuance From:

Standard:
Painesville, Ohio

Wabash:
Osborn, Ohio

Standard Lime:
Martinsburg, W. Va.

Davis, President, Superior, testified that Superior "did a little trucking of cement in 1931 or '32", but concluded that trucking was not economically sound beyond a radius of 35 to 40 miles from the plant "so that we never seri-

ously took up trucking.'"[1] There was hardly any business within that limited radius of the mill. He denied any agreement with competitors and also denied any agreement with dealer associations or railroads or any pressure by competitors.[2]

F. B. Warren, Vice President, Bessemer, testified that "once in a very long time" his company had a request from customers to take delivery in their own trucks. These were almost always emergency conditions "where a customer needs cement of a special test, in small quantities, and in a hurry, when it may not be available in the dealer's warehouse". Under these conditions Bessemer has always accommodated the customer.[3] As a result of common experience Bessemer concluded that it was not desirable to allow customers to come to the mill and take delivery by truck.[4] He denied any agreement or understanding with competitors on the subject of trucking.[5]

Wood, General Manager, Green Bag W. Va., testified that "somebody started trucking, and we trucked and discovered that the dealers in our territory were not satisfied, and we quit."[6] Further, "the trucking, I do not believe, was in over thirty or forty days, something like that . . . everybody seemed to be happy to get rid of the darn thing."[7]

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[1] (R) Tr. 29601.

[2] (R) Tr. 29602-04.

[3] (R) Tr. 32283-84.

[4] Id., Tr. 32284.

[5] Id., Tr. 32288.

[6] (R) Tr. 29881.

[7] Id., Tr. 29882.

9. Extent of Discontinuance: Summary

A summary of the foregoing evidence arranged by districts shows that as of July 2, 1937 the situation was as follows:

	Total Mills	Total Packing Plants	Mills: Trucking Discontinued From	Mills and Packing Plants: Trucking Not Discontinued From	Mills: Never Any Trucking From
District 1	26	1	26	1	
" 2	12	2	10	4	
" 3	19	3	15	7	
" 4	10	4		14	
" 5	11	4	6	7	2
" 6	19		10	3	6
" 7	12	1	6	4	3
" 8	12		11	1	
" 9	9		4	2	3
" 10	8			8	
	138	15	88	51	14

For the situation on the Pacific Coast (Districts 11 and 12) see Part XVII.

Trucking has never been discontinued from any of the 15 packing plants, above, or from any warehouse. Warehouses are not shown in the summary above.

K. Reasons Given by Producers for Discontinuance.

A number of business reasons were given by producers for their opposition to and discontinuances of deliveries to customer's trucks at the mill. These reasons are expressed in letters, announcements to the trade and other written documents, in answers to the Burns Clark Questionnaire given in 1934 and 1935 and in the testimony of executives of producers.

The following reasons were given. These are not listed in the order of their importance or in the order of the

frequency with which any one or more of these reasons is given.

1. negligible demand for delivery to trucks. Evidence as to this is digested Part VI, *supra*, pp. 1424-30.

2. mill does not have adequate facilities for handling and loading trucks. Evidence as to this digested Part VI, pp. 1430-31, *supra*.

3. customers' trucks arrived at irregular times and disrupted loading schedules. Evidence as to this digested Part VI, pp. 1431-34, *supra*.

4. increased accident hazard for trucks due to dangerous railroad crossings at mill. Evidence as to this digested Part VI, pp. 1434-35, *supra*.

5. greater cost in loading trucks than railroad cars. Evidence as to this digested Part VI, pp. 1435-39, *supra*.

6. damage to cement in transit in trucks. Evidence as to this digested Part VI, p. 1437, *supra*.

7. labor discontent of packers who work at piece rate due to additional labor in loading trucks. Evidence as to this digested Part VI, p. 1433, *supra*.

8. delivery to trucks at the mill causes a demoralization of delivered prices. Evidence as to this is digested below.

9. lack of certainty in truck rates results in destructive competition in quoting delivered prices. Evidence as to this is digested below.

10. dealer opposition: the producer's most important customer—the retail dealer normally taking delivery by

rail—finds his territory invaded by fly-by-night truckers and outside dealers and this disrupts dealer markets. Evidence as to this is digested below.

11. dealer opposition: sales to trucks, particularly for delivery from mill to job site, put the producer in the retail business and thus threaten the existence of retail dealers—the producer's most important customers. Evidence as to this is digested below.

The evidence is arranged below as follows: First, the evidence of the five large chain companies; and thereafter evidence of the other respondents arranged according to the geographical location of their mills beginning with Districts 1 and 2 and continuing in numerical order.

LEHIGH: The long answer of Lehigh for all its mills to the Burns Clark Questionnaire is reproduced in full in Part VI, pp. 1410-14, *supra*.

Bowen, Vice President, testified:

> "We have never hesitated to make it clear to dealers, railroads, or anyone else who inquired, that the Lehigh Company did not want to deliver by truck, and was doing so only where and in such cases as competition compelled it to." (Tr. 26871-72)

Further:

> "From 1929 continuing through 1930 and 1931 there was a great increase in trucking throughout the Lehigh Valley territory, and it was trucking which no longer reflected any possible economies or savings in truck delivery.
>
> • • • •
>
> It was, in reality, a form of price warfare in which some manufacturers were taking advantage of the assistance of an unregulated trucking medium giving the customers price concessions.
>
> The most common method by which this was done was to quote at delivered trucking price; engage a truckman to make the delivery and pay him an ex-

cessive trucking rate which he, in turn, refunded part to the buyer in the form of a rebate or concession.

There were also many cases in which certain manufacturers, confronted by truckload competition, having their plants so located that they couldn't meet the competition by truck, made adjustments in their f.o.b. car price in an effort to meet this competition, but since the physical characteristics of the two forms of delivery are so different, it was practically impossible to make a car price that would be competitive. They would either fail to meet the trucking price, or beat it, and that, in turn, established a condition which the trucking company set out to try to meet or overcome." (Tr. 26844-45)

As to the attitude of dealers, he testified:

"Well, briefly, at the outset, the attitude of most dealers was favorable to trucking. They thought that it involved elements of convenience and economy, and a great many dealers expressed themselves as thinking that it was the method of delivery of the future.

Within a very short time, however, that sentiment changed very materially.

• • •

As time went on, we were told by a great many dealers that the benefits, advantages, that they had anticipated from trucking were more than offset by its adverse effects, and we received a tremendous number of complaints from dealers that our own truck sales——

(Resumed) —were operating in such a fashion that we were not giving to our dealers the protection in their markets which we had assured them we would give them.

• • •

Our normal method of selling cement through dealers is to sell through only a limited number of dealers. In most markets we sell through only one dealer. In markets of somewhat large size we may

sell two or three dealers. In the large metropolitan markets we sell a great many dealers, although seldom, if ever, do we sell all of them.

Now, when we solicit a dealer to sell our product, and when we say to him, 'We would like you to handle Lehigh cement, and if you will do so we will sell no one else in the market but you, our sales organization will be working with you and for you, and any business that we can get in this market will go through you,' we are endeavoring to set up a permanent relationship that will be mutually advantageous and helpful.

We found that when we were selling cement, either by truck, or to trucks, we were unable to give our dealers that protection which we had promised them, and which we think they had a right to expect from us. When we sold to dealers—to their own trucks at the mills—we had no assurance that the dealer who bought from us upon the assumption that the cement was going to his own market, would not take that cement directly into the market of some other Lehigh dealer.

Even when we sold by hired trucks, and sold at destination prices, the same thing frequently happened, where it was a simple matter for the buyer to make a private arrangement with the truckman to take the cement not to his own market but through some other dealer's market. Those sort of cases existed by the score and jeopardized our dealer relations to a very large extent.

This entire period from 1929 to 1932 amounted to a state of guerilla warfare in which the manufacturers were engaged in a bitter competition and operating on unknown and often entirely fictitious trucking rates." (Tr. 26847-50)

The text of Lehigh's announcement of discontinuance at its Union Bridge, Md. mill giving the reasons therefor is set out in Part VI, p. 1599, *supra*. The announcement at its Lehigh Valley mills was in substantially the same form, p. 1605, *supra*.

UNIVERSAL ATLAS: Answers to Burns Clark Questionnaire:

Dist. 1 *Northampton, Pa. mill*:

Hudson, N. Y. mill:

[Italicized part quoted in Fdgs. Par. Eleven (b)]

"We had no control over the final destination of the cement to enable us to protect the market of our many customers. It was not possible to accurately figure the cost of delivery by truck *therefore we had no control of the delivered price at destination and could not prevent the disruption of marketing practices at destination.*" (Com. Ex. 968-4 H, 968-4 Y)

Dist. 3 *Universal, Pa. mill*:

"To stabilize market conditions disrupted by practices of customers who trucked their cement." (Com. Ex. 970-13 C)

Dist. 7 *Hannibal, Mo. mill*:

8 *Independence, Kan. mill*:

"Trucking at Hannibal and Independence mills came into existence as the result of the demand from customers who wanted to make greater use of what was apparently an efficient and economical method of transportation. However, when it developed that trucking resulted in cement being delivered by customers into towns where they had no investment in retail yards or in other words when we lost control of the final destination and market practices were disrupted, trucking was discontinued. Other companies, we believe had similar experiences in territory adjacent to their mills and discontinued trucking. We say our market territory was not appreciably affected by trucking because our proportion of sales by car in the trucking areas was generally less than outside those areas." (Com. Ex. 971-31 V)

Stone, Vice President, testified:

"We have no general policy, as is shown by the fact that we treat the subject differently at different places.

• • •

Q. Stated in a general way, first, what are your objections? Why don't you permit trucking from all of your mills? A. Oh, there are various reasons. I would say a very large underlying reason is that if we started or indulged in trucking to a large extent no doubt other companies in the business would take up the same practice. That has been our experience, that major moves made by one competitor in the business are followed by others. I think I can visualize such a situation, if various companies should take it up indiscriminately I think it would make it necessary for our company to——

• • •

• • • establish distributing stations, or warehouses, in large markets that could be reached easily by trucks from competitors' mills. That would be an enormous expense; in fact, we have already had a taste of it, in that we have felt ourselves compelled to provide such stations at certain locations, which locations had been and are being supplied with cement by trucks from competitors' mills." (Tr. 35132-35)

Further:

"Q. And, in your opinion, would the erection of those facilities by your own company, and other companies, ultimately result in higher costs, or not, to the consumer?

• • •

A. Well, it is perfectly obvious that the cost of distribution would grow and multiply. I can expand that, but it seems to me that it is obvious." (Tr. 35137-38)

And as to the attitude of dealers, he testified:

"Q. Do you have other objections to trucking from any of your mills? A. The most important objection is that dealers, in the main, do not like it.

Q. How do you know that? A. Well, we have, in years gone by, we have received so many expressions of their feeling about trucking, that it is a question that almost answers itself. Now, there may be a dealer here and there who does not agree with—or does not take that same view—but, in general, I know that I am expressing the true state of affairs when I say that dealers oppose trucking, and, obviously, a buyer usually does not persist in doing something that the—I mean, a seller does not persist in doing something that the buyers of his products do not like." (Tr. 35139-40)

On cross examination, he testified:

"Q. Why was it, as you learned it from the dealers, that they didn't like trucking? A. I think, Mr. Wooden, that the principal thought in the minds of at least the thoughtful dealers was that if trucking from cement mills became general manufacturers who were not within trucking distance would in all probability establish some sort of sub-stations or packing plants located near the mills from which trucking was done, so that they would be on a parity with those mills, and the dealer had—what shall I say—the haunting fear that if that did occur, that if he should see a packing plant and warehouses handling cement springing up in his town, that sooner or later cement was going to get onto the basis of a peanut business where the dealer would be eliminated from the scene.

Q. And the manufacturers sell directly? A. Yes, sir.

Q. They were also fearful, were they not, that dealers would truck into the territory of other dealers and upset the markets there? A. That was one reason, I think; yes, sir; take away business from him." (Tr. 35261-62)

Further:

"Q. As a matter of fact, trucking did tend to upset, disturb the ability of manufacturers to have the same destination price; didn't it? A. I don't think I would say that; no, sir.

Q. It had no such tendency? A. Maybe a bit more difficult to learn what the price is, but if I, as a manufacturer some distance from a mill was trying to compete with you nearer the market, where you are located near a market, and trucking is done by your mill, when I found out what the cost to the customer was at his destination——

Q. How are you going to find out in the case of trucking? You couldn't find out, could you? A. Well, in the best way we can.

Q. But you didn't know what it was going to be. A. You might say the same——

Q. You felt there was some uncertainty about what the delivery price would be? A. You might say the same thing, Mr. Wooden, with respect to—well, say, what has been referred to here as an arbitrary price in the town of Podunk, which is across the river in some States from the town of Squeedunk. We simply learn what that price is. Now, in the case of a truck, we would try to learn from the customers what it was costing them to get your cement to the place they want it.

Q. It was more difficult to find out? A. Oh, perhaps so." (Tr. 35264-65)

ALPHA: Dist. 1. Answer to Burns Clark Questionnaire:

[Italicized part quoted in Fdgs. Par. Eleven (b)]

"To stabilize marketing conditions.

We could not control the deliveries and the many trucking prices disrupted our entire marketing and price structure." (Com. Ex. 968-8 i)

"Somewhat affected by barge and truck deliveries which at times reduced our mill at net returns lower than we were willing to take. Also these methods at times disrupted delivered prices so that we could not figure our competition." (Com. Ex. 968-8 M)

The same answer was given for all Alpha Mills except its Birmingham, Ala. Mill from which there never was any trucking.

Coogan, Vice President, testified:

> "* * * the Alpha Portland Cement Company have always been opposed to making deliveries by trucks.
>
> * * *
>
> The only place where we have done it is where we were forced to do it in order to meet the competition existing at this point. * * *" (Tr. 23654)

He was shown the above answer in Com. Ex. 968-8 I to the Burns Clark Questionnaire and testified:

> "Well, the answer referred strictly to our own business, and our own dealer conditions, and I have already stated that when we made deliveries trucks at the mill some of our dealers availed themselves of it and some did not, and would not, and there was a great many bootleg truckers at that time looking for a return load, and we had an invasion of our own dealers' markets, and we began to lose a great many customers because if we allowed one dealer to take a truck delivery and invade another man's market with a cheap trucking rate, we could not ask that man any higher price for our cement delivered to him then even if he wanted to take a carload delivery." (Tr. 23662)

Further:

> "Q. Didn't the dealers who were not in a position to use trucking complain because the dealers who did use trucking were cutting prices? A. Many of our dealers did not want to truck and wouldn't truck, and some of our other dealers hired bootleg truckers, and they did at times invade the other man's market.
>
> Q. And in invading the other man's market, they did it at a lower price? A. They went in and took business in the other man's market. How they got it, I don't know.

Q. Well, then, some dealers favored truck and others were opposed to it, isn't that the situation? A. Many more were opposed to it than favored it." (Tr. 24755)

LONE STAR: Answers to Burns Clark Questionnaires:

Dist. 1 *Nazareth, Pa. mill*:

"To handle our dealer outlets on a more satisfactory and equitable basis." (Com. Ex. 969-3 E)

Dist. 2 *Hudson, N. Y. mill*:

[Italicized part quoted in Fdgs. Par. Eleven (b)]

"Unsatisfactory marketing conditions due to indiscriminatory trucking.

To protect our rail markets in the trucking zone from possible arbitrary rail prices established by distant competing mills to meet this truck competition." (Com. Ex. 969-3 V)

Dist. 6 *Norfolk, Va. mill*:

"Small demand in truck lots proved troublesome to operation. We therefore eliminated trucking entirely.

Too expensive and troublesome." (Com. Ex. 970-2 G)

New Orleans, La. Mill: Lone Star had answered that it had "never made such deliveries" from this mill and that this policy had given rise to "very few" difficulties. When asked what those difficulties were, Lone Star wrote to Dr. Burns as follows:

"What might be termed *important* difficulties really have not been experienced in connection with this plant's policy with reference to trucking. It is sometimes hard to make a small interior dealer understand why he cannot allow trucking. He usually wants to truck in order to secure less than carload quantities of cement at equal or lower prices than the carload price, or has hopes of defeating the es-

tablished carload price based on published railroad tariffs. Such customers seldom give proper consideration to overhead, depreciation, maintenance, etc. on their trucks. This is the sort of experience it was intended to cover in stating that very few difficulties arise as a result of our policy on trucking." (Com. Ex. 971-9 Q)

Dist. 8 *Bonner Springs, Kan. mill*:

"To prevent discrimination in pricing as between customers.

Because certain dealers were taking advantage of location and ability to truck and thereby defeating our dealer sales policy in other towns, causing a general unsatisfactory condition with trade." (Com. Ex. 967-16 M)

Dist. 5 *Limedale, Ind. mill*:

"Because of inability to maintain dealer distribution policy and retain our established dealer outlets under same." (Com. Ex. 975-17 T)

Dist. 9 *Houston and Dallas Texas*:

"Loading trucks was a more expensive operation at the mill warehouse as well as more expensive in our accounting and credit departments. We found our dealer trade dissatisfied due to the following reasons:

1. Having no control over the trucks we could not maintain our policy of protecting our dealer outlets at the points where they operated yards.

2. When we delivered small quantities to trucks our dealer trade took the position that we were definitely engaging in retail business." (Com. Ex. 976-1 D, Com. Ex. 976-13 Y)

Neylan, Assistant General Sales Manager, called as a Commission witness, testified:

"Q. Well, didn't you discontinue trucking at your mills because of the disturbing influence trucking had

upon the delivered price structure? A. We found that trucking injured our business.

Q. Injured your business by disturbing and making uncertain the delivered prices? A. Injured our business in many respects.

Q. In that respect? A. Not necessarily, no.

Q. Not necessarily. Do you recall writing anything to that effect? A. Yes, I do. That is not the only reason for it at all." (Tr. 6247)

And as to the attitude of dealers, he said:

"The Witness: The principal one that stands out in my mind is the constant difficulty with our dealer trade, with our customers.

By Mr. Wooden:

Q. What sort of dealers? A. All of them.

Q. What sort of difficulties? A. They did not want it.

Q. Why didn't they want it? A. I don't know.

Q. Do you mean to say you never even undertook to find out why they did not want it? A. They would come to us and tell us they do not look upon trucking with favor and they proceeded to back that up by not giving us business.

* * *

Q. Some individual dealers liked trucking, didn't they? A. We had a few individual dealers that liked trucking, if we would confine it to them.

Q. Weren't there some that liked it regardless of whether you confined it to them? A. Very very small percentage of them might. You never heard of those, though, you only heard from those that were penalizing you for doing it.

Q. Penalizing you for doing it? A. Yes.

Q. In what way did they penalize you? A. By not giving us business.

Q. Was that rather widespread? A. That is one of the things that hurt us the most" (Tr. 6343-44)

And further:

"Q. Did it tend to upset the manufacturer's prices to the dealers? A. It tended to upset our

whole method of marketing and had an effect on the consumption of cement in many instances." (Tr. 6352)

Koch, Vice President, testified on cross-examination:

"Q. Is it your claim that the delivery of cement to dealers' trucks at the mill didn't have any effect upon delivered prices? A. It might have; but the principal trouble was the friction with the dealer out at the community where he normally did business." (Tr. 33247)

PENN DIXIE: *all mills*:

Answer to Burns Clark Questionnaire:

"* * * The reasons for changes in and abandonment of loading trucks at the mill are:

(1) The manufacturer had no control over the final destination of the cement, which is necessary to protect the markets of its many customers.

(2) Since it was impossible to accurately figure the cost of delivery by truck the manufacturer had no control of the delivered price at destination which is necessary to prevent the disruption of marketing practices at destination.

(3) The loading of customers' trucks at the mill seriously interfered with the loading of freight cars as both could not be loaded at the same time." (Com. Exs. 968-5 P, 6 F, 6 X; 975-6 Z, 8 [illegible] O; 976-3 W)

Letters dated July 3, 1935 and August 20, 1935 both from Blaine S. Smith, then President, to Dr. J. M. Clark giving Smith's views on trucking are set forth in Part VI, pp. 1404-09, *supra*.

Browder, Traffic Manager, in his stipulated testimony said:

"* * * Penn Dixie found deliveries to customers' trucks at its plants objectionable for numerous reasons. Chief among these was the fact that deliveries to customers' trucks constituted retail business.

Penn Dixie has always been a wholesaler, the carload being its unit of sale, and none of its plants has been equipped to supply trucking business without considerable extra expense, inconvenience and difficulty." (Tr. 38149)

After setting forth difficulties at the plants he added:

"The trucking was carried on to a large extent by truckers who were not regularly engaged in the sale of cement or other building materials. Responsible and established dealer customers complained to Penn Dixie that these trucks were underselling them in their own towns. Penn Dixie was thus taxed to retain the good will of many of its best and most substantial customers." (Tr. 38150)

NAZARETH: Dist. 1. *Nazareth, Pa. mill:*

Answer to Burns Clark Questionnaire:

"Largely at the request and because of protests of our local dealer customers; also continued interference with car loadings." (Com. Ex. 969-9 o)

Robeson, Vice President, testified:

"• • • We had been under considerable pressure by a number of our dealers around in the locality asking us to discontinue loading trucks, and at the same time, even with the 15 cents on there, we still found that trucking was a very unsatisfactory operation.

• • •

Well, first off, the dealers were complaining, in the first place, that we were holding their trucks off. We had no way of telling when the trucks were going to arrive, and as those things would happen they would come in bunches. We did not have the facilities to load their trucks and get them away. They were complaining about their cost of their trucks being delayed and then in other instances we had complaints from our dealers, taking some of the towns where we had sold one dealer exclusively in that town for a number of years, and he would com-

plain to us cement was being loaded at our mill and being trucked in his town where he had worked with us for years in building up a demand for our brand in that town." (Tr. 28137-38)

On cross examination, he testified:

"Q. But it is more difficult to ascertain lowest prices of competitors when trucking prevails than when sales are made exclusively by rail? A. Well, it adds to your retail problem, because the tariff rates are available to anybody, and the trucking rates are anybody's guess, to some extent. That is, that was my experience prior to, say, 1932—that is, one trucker would figure his cost so and so, and the other fellow would figure his cost so and so, but you had an impact of competition that eventually got to the point where you had to say, 'Yes, we will take it at that figure,' or 'No, we won't.'

Q. Well, did that fact have any influence upon your abandoning of the transportation of cement by truck? A. No, sir; not in our case, it didn't, no, at no time did the amount of cement moved from our mill amount to more than 2 percent by truck.

Q. The certainty of prices at destination points is of no advantage to you? A. Well, yes, it is an advantage from the standpoint that we have got our men in the field every day to make certain that we have our fingers on the pulse of the market. * * *" (Tr. 28412)

Further:

"Q. I mean, you draw the line there,—you are not going to accommodate him, if it is trucking he wants; whereas, any other service is all right. A. Well, the very customers who originally started trucking from our mill were the very people who begin to ask us not to truck from our mill.

Q. Well, but there are still some customers who wanted to truck? A. Very, very, very—it would be an isolated case.

Q. Why don't you accommodate those fellows? A. We don't have the facilities for it.

Q. Why don't you get the facilities? A. Well, it wouldn't pay us to put in the facilities for those isolated instances.

Q. And it would tend to destroy the present existing price structure, wouldn't it? A. No, I wouldn't say that it would.

Q. Well, it would have an effect upon it, wouldn't it? A. It might be a factor in it, but there is another element to it, too. Loading trucks at our mill, we had cement going into our markets naturally, where we had long-term relationship with dealers at those particular towns, that kept us constantly in hot water with those dealers that had handled our brand; they felt they were entitled to have the call for our brand in that town.

Q. Haven't you expressed yourself on numerous occasions to the effect that you considered trucking a menace to stabilized prices? A. Who? Me?

Q. Yes. A. I never have; no, sir." (Tr. 28451-52)

COPLAY: Dist. 1. *Coplay, Pa. mill*:

Answer to Burns Clark Questionnaire:

"Objection on the part of dealers in building material to operation of trucking service by manufacturers." (Com. Ex. 969-8 Y)

HERCULES: Dist. 1. *Stockertown, Pa. mill*:

Answer to Burns Clark Questionnaire:

"We found that trucking created unequal conditions between the customers in many of our markets." (Com. Ex. 969-10 I)

Letter dated May 23, 1935 Hercules to Dr. Arthur R. Burns reads in part as follows:

"Some of the situations that arose due to truck deliveries were as follows:

The Hercules Cement Company has a dealer in a good size town within a reasonable distance of the mill. There are, as you know, a half dozen cement

mills within a few miles of the Hercules mill. These other Cement Companies also have dealers in the same town. A job comes up in the town and the dealer handling brand 'A' in that town has a number of trucks which he is not using continuously. He, therefore, figures that he can truck the cement from mill 'A' for 15¢ per barrel. The Hercules dealer, in this particular town, is not as well fixed on trucks. He figures his costs of trucking from our mill to the job at 25¢ per barrel. The result is that when the dealers quote on the job, the dealer handling brand 'A' beats our dealer 10¢ per barrel. We not only lose the job, but our dealer comes to us and insists we must reduce our price 10¢ per barrel to him because he believes the dealer who is handling brand 'A' is getting his cement at 10¢ per barrel less than he is paying us for Hercules.

Towns 'A' and 'B' are about equally distant from the Hercules cement mill and only 8 or 9 miles apart. The Hercules Company has a dealer in town 'A' who handled Hercules cement exclusively and he is the only dealer to handle it in town 'A'. A dealer in town 'B' has a good fleet of trucks which he is very anxious to keep moving at all times. A job comes up in town 'A' and the first thing we know the dealer from town 'B' is delivering Hercules cement in town 'A' in truckload lots on the job. The regular Hercules dealer in town 'A' immediately goes to some other brand of cement because he thinks we have sold the dealer in town 'B' for delivery in his town; whereas what has happened, in order to keep his trucks busy, the dealer in town 'B' has gone to our mill, gotten the cement in truckloads ostensibly to be delivered in town 'B', but actually for delivery in town 'A'.

The above are given you, in reply to your inquiry as to the actual instances, but the real difficulty with trucking is that it makes it impossible to enforce a fundamental principal of our sales policy. The dealers yard trade is the foundation of our business, and in order to get a yard to handle our brand, we must give the dealer the assurance that the business we

do in his town will be done through him: We can follow out this policy on rail shipments by refusing to ship a car to a Scranton dealer for delivery in Wilkes-Barre, if we have a satisfactory Wilkes-Barre dealer, but if the Scranton dealer sends his trucks to our mill we have no way of knowing where it may be delivered." (Com. Ex. 971-9 A-B)

ALLENTOWN: Dist. 1. *Non-respondent sales agent for respondent Valley Forge: Evansville and West Conshohocken, Pa. mills:*

Answer to Burns Clark Questionnaire:

"Reduction of nearby Freight rates."
"Unstable market conditions." (Com. Ex. 969-11 P, 12 D)

"* * * when trucking prices are f.o.b. mill and each purchaser figures a different cost of hauling, which appears to be generally done in the absence of known trucking cost, variable delivered costs at the same destination cause variable selling prices, which might be several of your own customers distributing in the same locality." (Com. Ex. 971-30 i)

EDISON: Dist. 1, *New Village, N. J. mill:*

Sweeney, Vice President, first described the physical difficulties at Edison's New Village, N. J. mill and then testified:

"Q. Now, Mr. Sweeney, apart from these difficulties which you have described to us, can you state what the attitude of your customers was with respect to trucking? A. Yes. A number of our larger customers in the New Jersey territory strenuously objected to trucking." (Tr. 35689)

* * *

"A. Well, the principal objection was that a considerable amount of the cement was hauled by fly-by-night-truckmen, who made sales along the line in the territories of our long-established dealers, and naturally caused those dealers considerable irritation,

and bringing about a very unfriendly feeling as far as the dealers were concerned toward our company." (Tr. 35689)

Further:

"Q. Mr. Sweeney, did your company regard delivery to customers' trucks at the mill as a menace to your company's prices, or pricing? A. No." (Tr. 35693)

After discontinuance Sweeney instructed Edison salesmen to find out what their dealers' reaction was to discontinuance. (Tr. 35689)

[Respondents offered three letters from Edison dealers, Resp. Exs. 2558-2560 for id., expressing approval of this action and one report from a salesman, Resp. Ex. 2561 for id., stating that he had not found a single dealer who did not like it. These were excluded (Tr. 35690-93) and respondents have moved to adduce them. Motion For Leave To Adduce Additional Evidence, Subject VI, pars. 45-56.]

VULCANITE: Dist. 1. *Vulcanite, N. J. mill:*

Answer to Burns Clark Questionnaire:

"Pressure brought by Railroads and Dealers." (Com. Ex. 969-7 R)

GIANT: Dist 1. *Egypt, Pa. mill:*

Answer to Burns Clark Questionnaire:

"To improve marketing conditions. Inability to control marketing conditions." (Com. Ex. 969-10 Z)

"Trucking rates are not published or controlled by the Interstate Commerce Commission or State Corporation Commissions as is the case with rail rates. Therefore, trucking rates varied widely and buyers were at a disadvantage not knowing what the competitors were paying for cement as the cost of trucking was an undetermined factor." (Com. Ex. 971-7 Z)

KEYSTONE: Dist. 1. *Bath, Pa. mill:*

Answer to Burns Clark Questionnaire:

"Deliveries to trucks were discontinued because it put us into the retail business, involving retail credits and collections, deliveries, etc., for which we were not properly equipped, and further, it was highly objectionable to our retail dealers, who were able to give us a more satisfactory form of distribution for this class of business by virtue of their equipment, warehouse facilities, etc." (Com. Ex. 969-12 S)

LAWRENCE: Dists. 1 and 2. *Siegfried, Pa. and Thomaston, Maine mills:*

Answer to Burns Clark Questionnaire:

[Italicized part quoted in Fdgs. Par. Eleven (b)]

"*Our business has been built on a delivered price basis and when we were selling to buyer's trucks at the mill our whole price structure within a trucking radius of the mill was jeopardized.*

The Complaints we received and the many controversies with our trade forced the abandonment of the policy." (Com. Ex. 969-6 P)

Ackerman, Sales Manager, Lawrence, called as a commission witness, testified:

"* * * I look upon our company as a wholesaler of cement, not a retailer. We depend on our dealers as our retailers. We were in constant controversy and argument for various reasons with our customers, and I learned early in my selling experience that when you get into a controversy with your customer, you usually win the argument but lose the customer." (Tr. 7266)

Further:

"Q. Did your experience in selling for delivery in trucks result in inability to know what the delivered price was of given places? A. Why, that natur-

ally followed. That is, it naturally—if I understand your question—it naturally followed. I don't know what the other man figured as his cost when he came with his truck and carted it away.

Q. Well—a—— A. (Interrupting) Let me explain this, please.

Q. Go ahead. A. This mill is up in Maine. Maine is essentially an agricultural State. Our experience showed that truckers on potatoes from Arista County came by the mill from Searsport, maybe as far as Boston. We found those trucks returning empty. They stopped at the mill for a load of cement on an order of some dealer. We found cases where cement was peddled along the road, in some cases, under the nose of our own customer.

Q. At cut prices? A. Wait a minute. Let me finish. We received complaints from our own dealer as to why it was he had received no protection from us. He was a customer of ours; why was somebody else in that town selling cement in his area?

Q. And at lower prices? A. Well, no doubt that is what caused him to complain. Now he simply said to us, 'Control that situation as far as I am concerned, or I won't buy any more of your cement.' (Tr. 7268-69)

* * *

Q. Did that whole situation as to the trucking there, in your opinion, tend to break down the delivered prices that were calculated on a rail basis? A. Not necessarily. It was not a question, as I view it, of breaking down the delivered prices. It was a question of doing when your best customers asked you to do, the people that you depend on for your business." (Tr. 7269)

As to the principal cause of dealer complaints, he testified:

"Well, your Honor, take a typical example. Half a dozen or a dozen trucks might arrive at your plant at one and same hour. Each trucker felt that he should be given attention immediately. The sixth or the twelfth trucker probably had to wait an hour

or two hours, and by the time he returned his boss wanted to know where he had been and what was all the delay. They had a lot of trucks up at the Lawrence plant.

By Mr. Wooden:

Q. That is another angle of it. A. That is one of the angles; his Honor asked me about it. We had cases of sudden thunder storm. Half of the contents of the truck maybe were soaked, and the question was, whose property was it, was it ours or was it the customer's. If he had loaded it on time they would not have gotten wet. We had cases where trucks broke down. We had cases where truck drivers stole the material, and we were in, as I said before, controversies with our customers, and from a sales standpoint, in my experience, that is bad business. Does that answer your question, sir?

By Mr. Wooden:

Q. Why didn't you let such of your customers as wanted the trucking make use of the trucks, while those who did not care for it, have it their own way? A. It was a case of the tail wagging the dog.

Q. You mean there were more that wanted it by rail than by truck? A. Absolutely." (Tr. 7273-74)

NORTH AMERICAN: Dists. 1 and 2. *Security, Md., Howes Cave and Catskill, N. Y.:*

Answer to Burns Clark Questionnaire:

"Because we could not be sure of point of consumption of cement.

Because method of calculating price based on delivered price at point of consumption could not be followed when point of consumption was not definitely known." (Com. Ex. 969-4 K, 4 W, 5 Z)

Porter, President, was shown the above answer to the Burns Clark Questionnaire on cross examination and testified:

"* * * I was referring there to the fact that if we permitted anyone to come and truck from our plant, then our dealers—some of our dealers will find that bootleg suppliers, irresponsible customers elsewhere would truck cement into their home towns and compete with them as they would think, at least, unfairly, and we had many complaints of that sort. In other words, it was necessary for us to control the delivered price to a dealer in a given town in order to keep him satisfied.

Q. Well, this reason that you stated in these Commission's exhibits in 1935 is one of the real reasons, if not the principal reason, despite the fact that you haven't stated it in your testimony here? A. The principal reason was that it was necessary to keep our dealers satisfied to keep the good will of our dealer trade.

Q. Well, I am speaking of this as a reason. A. And that is all tied up in that reason. That is one of the reasons why the dealers were dissatisfied with the practice of trucking.

Q. Well, it is one of the reasons you were dissatisfied with it, too, wasn't it, as you stated to Professors Clark and Burns? A. We cared nothing about that except as it affected the attitude of our dealers." (Tr. 34023-24)

North American's announcement of discontinuance in which the objections of dealers are stated as the reason for discontinuance and Porter's testimony as to that announcement are set forth in Part VI, pp. 1599-600, *supra*.

GLENS FALLS: Dist. 2. *Glens Falls, N. Y. mill:*

Answer to Burns Clark Questionnaire:

"To place all dealers on same delivery basis.
To protect dealer territories." (Com. Ex. 969-13 J, 13 Y)

FEDERAL: Dist. 2. *Trucking never discontinued from its mill at Buffalo.*

J. E. Bates, Sales Manager, testified however, that he regarded loading customers' trucks at the mill as a nuisance (his testimony on this is set forth *supra* Part VI, pp. 1438-39). As to the attitude of dealers, he testified:

> "A. Well, we, of course, have some of our dealers object to trucking; and, of course, we will find customers who like it. And whatever they want in the matter of getting the cement we agree to. If they want to truck it, we truck it. If they want it in carload lots, we ship it in carload lots. There are dealers who will never take a truckload of cement.
>
> Q. Have any of your dealers requested you to discontinue trucking? A. Yes, we have requests from dealers to discontinue trucking. It is not so much lately as we had when we first started in business.
>
> • • •
>
> The Witness: Well, their purpose in not wanting it trucked, I think was they had an idea it would develop into the general elimination of their services as a dealer to the customer, and I think that is——
>
> Trial Examiner Norwood: They wanted it delivered on the job in their own truck?
>
> The Witness: That is right. The dealers perform the service and trucking is just a means, according to their story, of eliminating their entire picture in the distribution of cement to jobs." (Tr. 30643-44)

Further:

> "• • • We received a number of letters from dealers in different parts of our territory that we serve, dealers who were outside entirely of the trucking area, that due to the weight of their business they urged upon us to discontinue trucking, and we paid no attention whatsoever to any of those requests." (Tr. 30656)

MEDUSA: Dists. 1, 3 and 5. Answers to Burns Clark Questionnaire:

For York, Pa., Dixon, Ill., and Manitowoc, Wisc. mills: "An attempt to stabilize the industry" (Com. Exs. 975-16 I-17 C, 970-11 Q, 12 F)

For Wampum, Pa., Baybridge and Silica, Ohio mills: "* * * Trucking became a factor which had a bearing on the delivered cost of cement. This cost varied because of unknown and indefinite transportation charges and in an effort to stabilize the industry trucking was eliminated as much as possible." (Com. Ex. 970-13 R, 14 W, 14 I)

Dawson, Vice President, in his stipulated testimony said:

> "* * * When Medusa was loading dealers' trucks our dealers complained, from time to time, that truckers or outside dealers were delivering cement at destinations for which it was not ordered, and were thereby invading the local dealer's market. This appeared to disturb Medusa's dealers, and they registered complaints with Medusa. Medusa's main sales outlet is through dealers and it is to its best interests to so deal with them that they will be able to compete with dealers who purchase cement from competitors. In order to maintain the dealers' good will, Medusa believes that it is necessary to be sure that its cement will not be peddled at lower prices in a given community than it is offering to those of its regular dealers who have established places of business in that community. Medusa has at times not met the trucking service offered by a competitor whenever it found that its dealers did not want trucking service." (Tr. 40069-70)

GREEN BAG, W. VA.: Dist. 3. *Kenova, W. Va. mill*:

Wood, General Manager, said:

> "For a while truck deliveries were made, but we were always against it; that was only a short period of time in which the dealers, themselves, were against it." (Tr. 29520)

On cross examination he was asked whether there weren't some requests for truck delivery after discontinuance. He answered:

> "No; everybody seemed to be happy to get rid of the darned thing." (Tr. 29882)

SOUTHWESTERN: Dist. 3. *Osborn, Ohio mill*:

Answer to Burns Clark Questionnaire:

> "Delivery to proper destination and variance in trucking charges could not be controlled." (Com. Ex. 970-2 V)

G. E. Warren, Vice President, testified that he had considered reopening their Osborn, Ohio mill to trucks and had decided not to do so. In reaching this conclusion he had considered the relative size of carload and truckload sales and also:

> "Comparison of whether or not it would make any improvement in our present method of doing business. Those factors would be satisfaction to the customer, requirements of the customer, availability of facilities, highway conditions, weather conditions, cost of delivery, responsibility of delivery, and I won't say that that is all, but those are the factors." (Tr. 29133)

As to the answer to the Burns Clark Questionnaire quoted above, he said:

> "I gave the questionnaire to a responsible clerk to secure the information.
>
> Now, I wouldn't make such a statement as that without being definite as to what it means, and, from my knowledge, as I testified here, my limited knowledge of the effects of trucking, that would have to be amplified." (Tr. 29331)

SUPERIOR: Dist. 3. *Superior, Ohio mill*:

Answer to Burns Clark Questionnaire:

"We had no way to compete without injury to ourselves because we had no way to determine amount paid for trucking. This gave buyer opportunity for deception." (Com. Ex. 970-5 H)

Davis, President, testified that:

"* * * but I went into the question of trucking heavy materials pretty thoroughly, and our conclusion at that time was that it was not economically sound beyond a radius of 35 to 40 miles from the plant, so that we never seriously took up trucking." (Tr. 29601)

"* * * there is hardly any business in that radius. The largest towns, the largest two towns are the cities of Portsmouth and Ironton, and they are not large towns." (Tr. 29602)

PITTSBURGH: Dist. 3 *Fultonham, Ohio mill*:

Answer to Burns Clark Questionnaire:

"Trucking unnecessary as we no longer had truck competition." (Com. Ex. 969-1 R)

In a letter to Dr. Arthur R. Burns, dated June 11, 1935, Letzkus, Sales Manager said:

"Trucking from a cement plant is not a disadvantage to that particular plant because it permits buyers to go right to the plant for their cement, get less than a carload at a time, secure deliveries as they want it, tie up less money at one time in cement, and in that particular area around the plant unquestionably gives the cement plant a very decided advantage over the rail shippers.

The disadvantage in trucking in general is the fact that other companies having customers in that area in which the cement plant is trucking in order to hold their trade must meet those local trucking con-

ditions which means either establishing a warehouse with the usual expense that go with it and have trucking from the warehouse to the jobs to meet the local competition or else truck from cars or make an allowance to the buyer, all intended to put them on an even basis with the local trucking mill and from the experience we have had in the past, trucking when it was more or less general had the tendency of weakening and in fact breaking down marketing conditions and price structure in the industry." (Com. Ex. 971-12G)

In his testimony, Letzkus said:

"Well, I am definitely opposed to trucking because I think it is harmful to our business. (Tr. 37856-57)

Trial Examiner Norwood: In what way?

The Witness: Well, they are not situated right, your Honor, on account of the location of our plant, there is not enough tonnage around in that area to help us a great deal, and if we truck, and if every other cement company trucks, it simply puts us out of markets that we cannot get into except at great expense.

Trial Examiner Norwood: How does it do that?

The Witness: Well, take, for instance, up at Cleveland. To give you a practical demonstration here, there is trucking all over the City of Cleveland. Now, that is only a matter of possibly 130 or 140 miles from our plant, and we cannot truck up there, couldn't begin to do it, and we, as a matter of fact, get no business out of Cleveland because we would have to ship it up by rail. We have to hire a warehouse, and we would have to have men in it, we would have to load the cars, we would have to reload the trucks, and we have got to take it out and bear the expense of putting it into the dealer's warehouse or to a job. Now, by the time we paid all that we would lose plenty money, so the result is that we solicit no business in the Cleveland area unless it would be carload business, and we cannot get that because everybody can take a truckload, fifty or sixty barrels; they do not have so much money invested,

they do not have to stock so much cement at a time, and they can get it quicker.

Now, if we attempted to truck from our plant—I have checked up on the thing, even if I could get a price that would permit us to truck it up there for, say, approximately the present freight rate on rail cars, that would still keep us away, out of the market, because a man——

Trial Examiner Norwood: You are talking about local trucking?

The Witness: Well, there may be some advantage in local trucking, but we do not have any inquiry for trucking down around our plant, and it is just unnecessary. Nobody seems to want it.

Trial Examiner Norwood: Go ahead.

The Witness: Now, your Honor, I was at the point of saying if we trucked to Cleveland we could only make one trip a day, and over those hills, probably could not carry over 60 barrels. Now, you would have to have an awful flock of trucks if you ever wanted to keep a job running——" (Tr. 37857-58)

As to the attitude of dealers, he said:

"Yes. We had complaints, scattered complaints, from dealers. They objected to it, did not want it." (Tr. 37862)

On cross examination, he said:

"I am definitely opposed to trucking, and it is a selfish motive to some extent, and they have trucking now in the Cleveland area. The result of that is that I cannot get any business in there, and if I could legally and properly find some way to have trucking discontinued, I would be very happy about it. Now, that is my attitude on this trucking." (Tr. 38018)

And gave as his reasons for not liking trucking:

"Well, there are a lot of reasons, and to give you the whole picture, one reason is that the location of our plant is the big disadvantage to us to truck, because

we have got to go too far to get any place where they buy very much cement. Another reason is because dealers do not want it. We rarely ever have any demand for trucking. Another reason, it upsets the whole arrangement at the plant. You have got to have some place where the trucks can go in and get the cement. A truck may come in at 10 o'clock, and another might come in at three. If you got your men loading cars on the other side of the plant you have got to bring them over there. Another reason is that there are railroad tracks there that these trucks have to cross to get around to the plant." (Tr. 38019).

"Another reason is this: When a fellow takes a truck load of cement away from there he may take it right under the nose of some good dealer, and that dealer gets sore for this man coming into a market where he is handling our cement. He might go and take it and put it on a job some other dealer sold; and there are so many innumerable instances where it is not a good thing from my point of view." (Tr. 38019-20)

DIAMOND: Dist. 3. *Middle Branch, Ohio mill*:

Answer to Burns Clark Questionnaire:

"To better conditions in the industry and the hope of better prices.

Refusal of other companies to better conditions in this district until trucking was abandoned." (Com. Ex. 970-4 W)

McKeag, F.T.C. Attorney-Examiner testified that when he interviewed Herbert Raff, President, in November, 1936 Raff stated that Diamond had discontinued trucking from their Middle Branch, Ohio, mill:

"Because they had an experience a short time before where a dealer in Canton, who had a number of trucks, old trucks, which he had used for some time, had been fully depreciated so far as his cost of doing business was concerned, came to their plant and

trucked cement therefrom to Canton, and his only expense of doing it was the cost of the man to drive the truck and gas and oil, whereas another competing dealer in Canton did not have the trucks and was obliged to hire trucks and men, and that it was an unfair condition so far as that dealer was concerned, and, consequently, they decided to eliminate all trucking.

Q. Did he state wherein it was unfair? A. Because the dealer did not own his trucks, was at a disadvantage because his cost of trucking the cement from the plant to Canton was higher than the other one." (Tr. 12220-21)

BESSEMER: Dist. 3. *Bessemer (Walford) Pa. mill:*

F. B. Warren, Vice President, had this to say as to why Bessemer discontinued:

"The conclusion was based to quite some extent on our experience in operating that Cleveland warehouse, which presented a condition similar to letting people come to your mill. They come to our warehouse, to our property, with their trucks to load, and, to put it in a very few words, that just puts you right in a retail business, dealing in very small quantities, many bills—many invoices to make, and method of securing the business entirely contrary to our idea of the proper way to operate our business.

People likely to come at all hours forces you to have crews handy, or face customer ill will. And if that were multiplied by the great number of customers that might be involved if you set out on an f.o.b. mill basis, it would probably introduce congestion at the mill." (Tr. 32284-85)

[Testimony as to the attitude of Bessemer dealers was excluded and respondents offered to prove through the witness F. B. Warren that Bessemer dealers were opposed to trucking except under certain emergency conditions on the ground, among others, that an increase of trucking would tend to eliminate the existence of dealers. Respondents have moved to adduce this evidence. Motion For Leave To Adduce Additional Evidence, Subject VI, pars. 45-46.]

WEST PENN: Dist. 3. *West Winfield, Pa. mill:*

McKee, Vice President, testified as to his reasons for discontinuance as follows:

> "The Witness: The principal reasons were the extra cost of handling and loading cement on trucks; the risk of loss in accounting for the total amount loaded into a truck; the trouble that it made when one dealer who was exclusive with us in one town would truck cement over into the town of another dealer, therefore, after he had developed a demand for our product in that town, which caused us to be in a controversy with him; and the fact, in general, that it was putting a manufacturing plant into the retail business.
>
> *By Mr. Leisure:*
>
> Q. And what, if anything, did you find from your customers as to whether or not they were favorable to trucking? A. An increasingly large number expressed themselves as dissatisfied with trucking." (Tr. 27795)

KOSMOS: Dist. 5. *Kosmosdale, Ky.:*

Answer to Burns Clark Questionnaire:

> "On account of objections from our carload dealers located within the trucking area." (Com. Ex. 970-1 D)

Horner, President, testified that:

> "At one time for a short period we permitted truckers who were running back from Louisville past our mill to pick up cement, but it immediately got us into trouble with our regular dealers and we had to stop it." (Tr. 36954)

[Respondents offered a letter from a Kosmos dealer praising Kosmos for having discontinued trucking and saying in part:

"You will no doubt recall the condition several years ago, when we all carried cement in our warehouses, and couldn't sell it because you were allowing the trucker to go by and pick it up from your plant. These truckers would haul in cattle, etc., and then pick up a load or less of cement and peddle it around to all our customers, just for the haul bill, thereby getting pay loads both ways." (Resp. Ex. 2766 for id.)

This exhibit was excluded (Tr. 36956-57) and respondents have moved to adduce it. Motion For Leave To Adduce Additional Evidence, Subject VI, pars. 45-46.]

LOUISVILLE: Dist. 5. *Non-respondent*: *Speed, Ind.*:

Answer to Burns Clark Questionnaire:

"The promiscuous trucking by everybody had interfered considerably with our regular established dealer business. Building supply dealers whose business had been built up for years through the service they rendered to their community and whose business in carloads was very desirable to us, were put in a position of not being able to compete for legitimate business they had probably been responsible for developing. It was about to leave us without the cooperation and promotional help of the building supply dealer in each community. To stop the inroads into their business by irresponsible truckers and preserve the distribution of our products through reputable concerns in each community we discontinued trucking altogether." (Com. Ex. 975-18 o)

SIGNAL MOUNTAIN: Dist. 6. *Chattanooga, Tenn. mill*:

Answer to Burns Clark Questionnaire:

"* * * Because of uncertainty of prices at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable." (Com. Ex. 975-12 Z)

CUMBERLAND: Dist. 6. *Cowan, Tenn. mill*:

Answer to Burns Clark Questionnaire:

> "Because of inability to determine or control uniform transportation costs for lack of published truck tariffs." (Com. Ex. 976-12 N)

The testimony of Pearson, Secretary-Treasurer is set forth *supra* Part VI, pp. 1608-09.

HERMITAGE: Dist. 6. *Nashville, Tenn. mill*:

Answer to Burns Clark Questionnaire:

> "Keep one dealer from selling in another dealer's territory at a lower price on account of difference in freight allowed." (Com. Ex. 976-10 T)

McGovern, Sales Manager, testified to what is meant by this answer to the Burns Clark Questionnaire as follows:

> "Well, as I testified before, when a truck came to our plant we took his destination price and deducted the freight to our plant, consequently, the farthest point he came from why, the more deduction the freight was. That enabled him to stop it intermediately and sell it, interfering with our dealer trade, and it caused us so much trouble we eventually just quit it. We held on as long as we could.
>
> • • •
>
> Well, we have a good many dealers in the close vicinity of Nashville, and, as I say, when a dealer came from a far-off point he got his cement cheaper at Nashville; consequently, he could stop it at intermediate points and disrupt our policy at that point with our cement." (Tr. 36175-76)

NATIONAL: Dist. 6. *Ragland, Ala. mill*:

Dannelly, Vice President, put it this way:

> "Well, the dealer who was getting the cement for less money began to sell it in the other dealer's town, and the dealer in that town said, 'Well, we are

not going to do any more business with you. This fellow has got no right to come over to our town.' " (Tr. 39582)

On cross examination he said:

"Q. I am asking you what effect you have considered that deliveries to trucks at your plant on an f.o.b. mill basis would have on these delivered price quotations for rail delivery? A. I do not think we have ever considered that point at all." (Tr. 39774)

* * *

"Q. And in connection with that problem of distribution, you considered the question of diversions? A. It was because of diversion. It was because of the delivery of some cement by one dealer in another dealer's town that made us stop trucking." (Tr. 39781)

SOUTH DAKOTA: Dist. 7. *Non-respondent, Rapid City, S.D.*:

Hartley, Sales Manager, testified as follows:

"Q. As a result of your experience, are you in favor of truck loading, or not? A. I am not.

Q. Why do you continue to sell them at all? A. It is an accommodation to our customers.

* * *

A great many of our customers, who are in small towns—a few in towns away from the railroad—and their sales are so very small it is impossible for them to move a carload of cement in any reasonable length of time. The consequence is that they buy in small quantities and move it faster.

Q. Mr. Hartley, will you sell to just any person who appears at the mill with a truck? A. No, sir.

Q. What do you require? A. A written order from a recognized dealer." (Tr. 41536-37)

As to the attitude of his dealers he said: "Generally speaking, they object to trucking"[1] because: "Certain

[1] (R) Tr. 41537.

people are very much inclined to overstep their territories and peddle cement."[2] He added that his interest in this was that: "I don't care to antagonize our dealers."[3]

HAWKEYE: Dist. 7. *Des Moines, Iowa mill*:

Answer to Burns Clark Questionnaire:

> "General dissatisfaction. More expensive to load than carloads. Much greater liability to accident than when loading carloads. Wanted railroads to have tonnage." (Com. Ex. 976-12 Y)

In his stipulated testimony, Manley, General Manager, said: "Many of the dealers who were large customers of the Hawkeye Company complained that the Hawkeye Company was in direct competition with them in selling cement for truck delivery in less than carload lots. They contended that the company was discriminating against them by permitting outside dealers to truck cement into their market. It had always been the policy of the Hawkeye Company to market its cement in carload lots because the carload lot is the most economical unit of sale"[4] and then went on to describe difficulties at the plant.

DEWEY: Dists. 7 and 8. The conflict in the evidence as to Dewey's discontinuance of trucking at its Davenport, Iowa and Dewey, Oklahoma mills is set forth above, Part VI, pp. 1617-19, 1620-21.

Capen, Vice President who testified that Dewey had discontinued at its Davenport mill, had this to say:

> "Q. Did you find that some dealers took the cement in trucks into territory of other dealers and undersold them? A. I believe that I remember there were instances, although I don't remember the particular instances.

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[2] (R) Tr. 41538.

[3] (R) Tr. 41538.

[4] (R) Tr. 41627.

Q. Did that tend to disrupt or upset the regular destination price at the point to which taken? A. I don't remember if it did or not.

Q. Well, it isn't altogether a question of memory. Based on your experience in the business, did it have that tendency? A. I think it would, yes." (Tr. 12707)

• • •

Q. Wasn't one of the reasons you discontinued trucking because it had this disturbing effect on the destination prices that you mentioned? A. I would say that was one of the reasons in the tri-cities.

Q. Tri-cities? You mean by that—— A. Rock Island, Moline, and Davenport." (Tr. 12708)

As to the attitude of dealers, he testified:

"Q. Does that mean that the dealers for whom trucks were loaded appreciated that service, or what? A. Well, I don't know whether they appreciated it or not, but I think they felt that they could make money by trucking from our plant.

Q. Did you find some of them favored it, made use of it? A. Yes, they all—most of them did make use of it, yes, sir." (Tr. 12709)

Bass, F.T.C. Attorney-Examiner testified that when he interviewed Tyler, President of Dewey in the fall of 1936, Tyler told him that Dewey had discontinued delivery to trucks "for the reason that truckers who came to the mill and purchased the cement and took it back to their respective destinations would be able to own it cheaper than some of their competitors who purchased in carload lots."[5]

MISSOURI: Dists. 7 and 8. *Prospect Hill (St. Louis) Mo. & Sugar Creek (Kansas City) Mo. mills:*

Alexander, President, in his stipulated testimony said:

"The Missouri Portland Cement Company received complaints from many of its dealer customers

[5] (C) Tr. 13393.

about its policy of selling in truckload lots. Its dealers complained that the company's policy of selling in less-than-carload lots was a policy which tended to place the company in the retail business in direct competition with many of its customers. These complaints became increasingly frequent, and, finally, it decided to, and did, discontinue sales in truckload quantities." (Tr. 37130)

Reiter, Chairman, Cement Code Authority, testified as to the attitude of dealers as follows:

"By delivery to trucks at a mill or by delivery to destination by trucks other than those owned or hired by the cement company, the cement company is very apt to show discrimination as between customers and be penalized for it by their principal customers, which are the dealers." (Tr. 4137)

and illustrated his point by an example taken from his experience with Missouri, as follows:

"* * * when I was with the Missouri Company they had a dealer at St. Charles, Missouri, who was right on the line of the back haul of empty stock trucks which went loaded into St. Louis, and these stock trucks would pick up cement, and it happened to be our brand of cement, at this dealer in St. Charles, and hauled it back into the interior of Missouri at a very low rate, because otherwise they would go back empty, and inasmuch as the price at St. Charles, Missouri was lower than the interior points in Missouri, every place that our brand of cement hit, the dealer that we had at that point would threaten if we did not correct the situation, he would quit buying our brand of cement. That condition exists in many places." (Tr. 4138)

and further:

"Now, I think you can readily understand that that is a very serious thing to a cement company, to have their dealers over a wide area threaten to deprive them of their business." (Tr. 4140)

* * *

"Q. Why couldn't you have solved your difficulty there in Missouri and in cases like that by allowing dealers to take delivery by truck? A. The dealers quite evidently didn't feel that that would solve their difficulty. They preferred delivery by rail, rather than delivery by truck, for the reasons indicated in this example." (Tr. 4143)

NEBRASKA: Dist. 8. *Superior, Neb. mill:*

Answer to Burns Clark Questionnaire:

"Lack of standard trucking prices demoralized the market.

Truckers returning from large markets like Omaha, would haul cement for gas and oil on return trips. Delivered prices became demoralized." (Com. Ex. 976-4 L)

Hoenig was shown the above answer and testified as follows:

"Well, what I had in mind there, it demoralaized the market not so much as we were concerned as manufacturers, but among the dealers themselves, because trucking was being done from various sources, various mills, and at different amounts of revenue. Some of them would haul probably on their return trips for mere gas and oil; some of them, we do not know what they hauled for, what their rate was, and others would haul probably by subterfuge, would order cement for trucking to one point and would haul it into another. The result was that our dealers seemed to regard us as protectorates, protectors of their property, more or less, and held us responsible for whatever happened, so that if one dealer or one individual or trucker did something that displeased them they naturally came back with a complaint on us." (Tr. 42045)

On cross examination he was questioned as to why the company was interested in demoralization of the dealer market. He answered:

"We were concerned in it naturally because if it caused a lot of friction and dissatisfaction among the trade, why, naturally, the trade were complaining to us, and we always use our own best efforts to do what we can to cooperate with our trade, keep them satisfied.

• • •

Q. And you were anxious to correct this demoralization in the competition of the dealers? A. Well, you may use the word 'correct', if you wish to. What we were interested in was avoiding the complaints that were coming from our dealers regarding this situation which trucking seemed to have been contributing to. We had some dealers that, without saying a word to us, refused to buy our cement because another dealer would truck into his immediate territory where he had a plant, and where the first dealer had no representation.

• • •

Well, we did not necessarily—the matter of his cutting prices—that was a matter of local competition. We did not always know about the price situation, but what we were particularly interested in, as I said before, was in not dictating as to how they should sell or how they should do business, but in trying to avoid the complaints that were coming to us from whatever source they might be, so that we would not be blamed for it." (Tr. 42107-09)

ASH GROVE: Dist. 8. *Chanute, Kansas & Louisville, Nebraska mills:*

Answer to Burns Clark Questionnaire:

"The loading of trucks became a burden and truck shipments gave dealers an opportunity to divert cement to territory in which they had no yards, thus demoralizing the markets and disrupting our long established dealer policy. Generally speaking, trucking was very unsatisfactory to dealers and ourselves alike." (Com. Ex. 976-7 P, 6 X)

CONSOLIDATED: Dist. 8. *Fredonia, Kansas mill:*

Answer to Burns Clark Questionnaire:

> "On March 31, 1933 we discontinued policy of selling cement on trucks at our mill because of uncertainty of price at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable." (Com. Ex. 976-5 J)

MONARCH: Dist. 8. *Humboldt, Kansas mill:*

Answer to Burns Clark Questionnaire:

> "On 3/29/33 we discontinued truck deliveries at plant, making deliveries by rail only, our plant being best equipped for rail shipments." (Com. Ex. 976-8 K)

Brooke, Vice President, in his stipulated testimony said:

> "Regular dealers of the Company complained to the Company that it was in direct competition with them in retail sales. Fly-by-night truckers peddled cement without regard to overhead, which the Company's dealers had to take into account." (Tr. 42199)

OKLAHOMA: Dist. 8. *Ada, Oklahoma mill:*

Bass, F.T.C. Attorney-Examiner, testified that when he interviewed Thompson, Sales Manager, in the fall of 1936, Thompson told him that this company discontinued trucking and

> "* * * that if a dealer was not large enough to purchase in carload lots, why, he wouldn't consider him a legitimate dealer." (Tr. 13406)

TRINITY: Dist. 9. *Dallas (Eagle Ford) mill:*

Answer to Burns Clark Questionnaire:

> "* * * To assure ourselves of uniform haulage cost to destination.

Unsatisfactory to purchasers of cement due to this inability to definitely figure cost on a given project at time of making bid." (Com. Ex. 976-13 K)

For Houston mill:

[Italicized part quoted in Fdgs. Par. Eleven (b)]

"• • • *Because of uncertainty of price at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable.*" (Com. Ex. 967-17 G)

L. Restricted Trucking Areas: Aetna and Huron Trucking Plans: Meetings 1933-1935.

Much of the evidence that follows deals with the trucking practices of Huron and the reactions of competitors—Aetna and others—to those practices. Crapo, Vice President of Huron, was examined at length on these matters as a Commission witness. In the course of his testimony he used the expression "moral suasion" but had no specific instances of this in mind.[1] Commission counsel asked him what he meant by this expression and he answered:

"A. Well, of course, for many years the cement industry has gathered at its association—out of those discussions which came up, why, individuals changed their ideas.

Q. And policies? A. And policies.

Q. When you say cement associations, do you mean the Portland Cement Association? A. Yes." (Tr. 11397)

Further:

"Q. • • • Have you been present at any meetings of that Association where this so-called moral suasion was exercised?" A. There is a great group of people, and they get into groups and talk.

[1] (C) Tr. 11391.

By Mr. Wooden:

Q. Yes. Have you participated in some of those group discussions? A. I think so.

Q. Did you observe, in the course of those group discussions, this moral suasion that you speak of? A. Yes, sir.

Q. Well, now, can't you give us some specific instances? A. No." (Tr. 11397-98)

He was then asked whether there was any "moral suasion" outside of these association gatherings and he answered:

"A. Well, I think they always tried to persuade each other, wherever they met.

Q. That is, persuade each other to do what? A. Well, to rub off the edge of their notions.

• • •

Q. You mean, to compose differences of opinion? A. That's it." (Tr. 11399-400)

Further:

"Q. Have you known instances in which some of the leaders of the industry, big men in the industry, have attempted to compose such differences by moral suasion? A. Why, the mere fact that they are big men, they are more likely to suggest an easing of the individual's practice.

• • •

Q. Now, I am asking you what individuals among the big men that you speak of have attempted to exercise such moral suasion. A. I have.

Q. Yes; who else? A. Well, I—I have—it may be a conceited remark—but I think I have given more study to trucks than any other.

Q. All right. A. That they can learn wisdom from me.

Q. All right. You have been one of the big men who have tried to compose these differences about trucking; is that right? A. About trucking; yes, sir.

Q. All right. Who are some of the others? A. I —I don't recognize any others.

• • •

Q. Now, I want to know who the other people were that you state attempted to compose the differences by moral suasion. A. I think I was successful in composing the differences with anybody—I can name the ones that I was not successful with, in composing the differences with.

Trial Examiner Nor[illegible]od: Name them.
The Witness: Aetna.

By Mr. Wooden:

Q. All right. You named Aetna. A. Yes.
Q. Were you unable to compose the differences with Aetna during the time Mr. Lingemann and Mr. Cree were in charge? A. I don't think they were ever composed.

• • •

Q. Have the differences between Huron and Aetna been as pronounced as they were during the time Mr. Lingemann and Mr. Cree were there? A. They have not been as pronounced." (Tr. 11400-03)

1. Huron at Oswego, N. Y.: 1933

Crapo, Huron Vice President, testified as a Commission witness that when Huron first came into Oswego in August 1932 it "created quite a lot of comment."[1] When asked from whom this comment came he answered:

> "I don't know,—I mean on that—it is not in—I mean it—it didn't come to me, I think it is—all I have got is hearsay, that's all." (Tr. 11052)

and identified the comment as coming chiefly from Alpha and Lehigh.[2] As to the nature of the criticism he testified:

> "The fundamental objection is that the truck delivers on the job when the rail shipment delivers on the nearest side track." (Tr. 11055)

[1] (C) Tr. 11050.

[2] (C) Tr. 11053, 11058-59.

Further:

"Q. Well, were any representations conveyed to you that you should modify or change your method of delivery by truck from Oswego silo? A. Well, there was a good deal—well, yes, suggestions were there.

Q. Where did they come from? A. Well, I don't know that." (Tr. 11056)

• • •

"A. I can give you the results. We then defined the trucking area out of Oswego." (Tr. 11057)

• • •

"A. It has always been the plan of Huron to limit its trucking inside of practical trucking limits. Now, the present condition—it is all limited, yes. I mean, that comes—we are limited at Toledo; we are limited at Cleveland; we are limited at Buffalo. We limit it at Oswego." (Tr. 11060)

• • •

"Q. And in the case of Oswego, you changed those limits after criticism was brought to you from some of your competitors? A. I think it was rather a fear rather than—but, anyway, they made a trucking area out of Oswego.

Q. What do you mean by 'fear'? A. Because it occurred in other places. They didn't like the delivery on the job.

Q. Who did not? A. I mean, it wasn't popular with the rail mills." (Tr. 11060-61)

Later he was asked what he meant by the word "fear" and he said:

"A. Oh, we always have—when you get into a difference of opinion, and it is a big, powerful individual and company, you always got a little fear as to where they are going to hit you.

Q. In other words, do you mean that if you share in some of your money-saving devices with your customers and lowered the price, that you might be

made to suffer for it? A. Yes, I mean just that." (Tr. 11124)

On cross examination by respondent's counsel he testified:

"Q. • • • Now, has that been established by any agreement of any kind with any other competitor?

• • •

A. Well, when this service began to go—to get started, why, there was naturally a good many questions that the nearby mills brought up, and that led to considerable conversations, and the result of those conversations was, I think, we made it 40 miles. I can get that. I know we didn't like it, because we just missed Syracuse, that we would have liked to have, but in order to quiet the situation we—Syracuse was out." (Tr. 11262)

Asked what he meant by the use of the word "fear" on direct, he said:

"A. Well, there was a good deal of rather intense feeling as to that—and we—Huron felt—that if we pushed it too far that something would be upset somewhere or other, we didn't know. We tried—to use the other expression—to quiet that situation. Neither side of this was satisfied with the result." (Tr. 11263)

When asked whether the action was the result of any agreement between the various mills, he said:

"A. There was no agreement, and I think that Huron was the only one that expressed it. I mean we put it in——

Trial Examiner Norwood: With an understanding?

The Witness: Well, I don't think any understanding—no—that we ever felt changed conditions. We changed, as we have done, we changed the—didn't like Lucas County. Well, when we changed it, then there was too much pressure, we withdrew it, and

then we changed it again, and it was quieted down——" (Tr. 11265)

Huron has never delivered cement by truck to Syracuse from Oswego, a distance of about 35 miles, but that east and west of Oswego truck deliveries are made for a distance greater than 40 miles.[3]

2. The Cleveland, Ohio, Area: 1932

Crapo, Vice President, Huron, testified that Huron was the first producer to start trucking in the Cleveland area[1] and when asked whether Huron met criticism from other producers testified that John of Medusa criticized them and also W. A. Davis of Standard and Schmutz of Bessemer.[2] He then testified that Huron confines trucking to Cuyahoga County and testified further as follows:

"Q. Did any of these gentlemen you named suggest that you ought to limit your truck delivery to Cuyahoga County? A. Oh, all I can say on that is that whatever our trucking schedule is, that was what we agreed to. I mean, under the thing, and, of course, when you go into a place and have no limit, why, I mean ours—but that was fair between the—I don't know whether I am satisfied with it now, but that is a matter of all our trucking limitations. We are perfectly willing to furnish as they stand now.

Q. Did the criticism cease after you limited it to Cuyahoga County? A. Well, it is a difference of opinion, which I don't think will ever cease.

Q. Well, is the criticism—— A. They may think we are Jews and they are Catholics. We can't get on a common basis in the cement business.

Q. Well, is criticism still coming to you about your trucking in Cuyahoga County? A. I think not. I think that is peaceful at present.

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[3] (C) Tr. 12081.

[1] (C) Tr. 11278-79.

[2] (C) Tr. 11065-66.

Q. In other words, you satisfied the criticism by limiting your trucking to Cuyahoga County; is that right? A. We have—I think we have accomplished the purpose of being a good neighbor.

Q. After your neighbors told you what they thought being a good neighbor would call for? A. Yes.

Q. Is that right? A. Well, how does the neighborhood—well, I won't answer the question. After sensing the neighborhood opinion, why, that is what we put in." (Tr. 11067-68)

The date when Huron confined its deliveries to Cuyahoga County is not shown but it does appear that on August 10, 1932 truck deliveries Huron confined it to an area within 30 miles of Cleveland.[3]

On March 31, 1932 Medusa confined its trucking within a 40 mile zone and on October 4, 1932 confined it to Cuyahoga County.[4]

3. The Toledo, Ohio, Area: 1932-1936

Crapo, Vice President, Huron, testified that Huron's trucking policy in Toledo was criticized by Alpha, Medusa and Standard.[1] At first Huron's trucking was confined to Lucas County, Toledo and then it was extended to some adjoining counties "and that created quite a lot of criticism."[2]

After this criticism Huron again confined it to Lucas County "and then after that we extended it again, but not quite as many counties as had been in the first one, and that, I think, is now going on."[3]

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[3] Meyers, Traffic Manager, Huron (R) Tr. 33490-91.

[4] Com. Ex. 970-13 R, 14 F: Medusa answer to Burns Clark Questionnaire.

[1] (C) Tr. 11069-70.

[2] (C) Tr. 11072.

[3] (C) Tr. 11073.

The dates and details of Huron's changes in policy are given in the testimony of Meyers, Traffic Manager, Huron (digested in Part VI, pp. 1456-57, 1468-69, *supra*) but this testimony shows only changes in 1935 and 1936. Prior to that date Medusa evidence shows that on March 31, 1932 Medusa confined deliveries within a 50 mile zone and on October 4, 1932 confined it to Lucas County.[4]

In evidence are the following dates of changes in policy:

June 24, 1935 Huron announced truck deliveries to 12 counties around Toledo.[5]

September 4, 1935 Diamond announced that it would confine truck delivery to Lucas County.[6]

September 7, 1935 Huron announced that it would confine truck delivery to Lucas County.[7]

May 25, 1936 Huron quoted truck prices in five additional counties around Lucas County.[8]

June 5, 1936 Wolverine made a similar announcement.[9]

4. The Huron-Aetna Controversy: Michigan: 1933

On March 10, 1933 Huron announced a new type of service from its Michigan plants (Detroit, Alpena and Saginaw). The customer was given the option to take delivery by rail or by truck at the same delivered price per barrel. If he took by truck, the minimum quantity was 60 barrels, freight was prepaid and delivery would be made

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[4] Com. Ex. 970-14 W, 15 M: Medusa answer to Burns Clark Questionnaire.

[5] Meyers, Traffic Manager, Huron (R) Tr. 33420.

[6] Com. Ex. 1928: Interoffice memo. dated Sept. 4, 1935, Raff, President, Diamond, to all salesmen.

[7] Meyers, *supra*, Tr. 33422.

[8] Id., Tr. 33426.

[9] Resp. Ex. 2635: Letter dated June 5, 1936, Nelson, Sales Manager, Wolverine, to Byron.

to the trade area in which the customer operates. If the dealer came to the plant with his own truck he would be charged the prevailing delivered price at his destination.[1] At about the same time Aetna announced to its trade that it would deliver either by rail or by truck and if by truck the delivered price would be the same as if by rail plus a 10¢ a barrel service charge with a minimum truckload of 60 barrels. Truck delivery would be made within a radius "of approximately fifty miles, but at no time shall the cost of trucking exceed the published freight rail rate." If the dealer came to the warehouse he would be charged the delivered price at his destination.[2]

Early in May and two months after these announcements had been issued Oscar Lingeman, in charge of Aetna's trucking operations in Michigan, requested Rooney, Assistant General Sales Manager, Huron, to send a copy of Huron's announcement to Johnson, Aetna's President, in Boston. Rooney did so in a letter dated May 2, 1933 and on the same day sent a copy to Struckmann, then President of Lone Star (then International).[3] In his letter to Johnson he said:

> "After the Huron plan was broadcast to the trade, it was adopted by most companies as a feasible method of operation in the territory." (Com. Ex. 417 G)

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[1] Com. Ex. 422 o: Huron announcement to customers dated March 10, 1933.

[2] Com. Ex. 417 HH: Undated Aetna announcement.
Com. Ex. 417 G: Letter dated May 2, 1933 Rooney (Huron) to Johnson (Aetna) states that Aetna's announcement was dated March 8 and effective March 10, 1933.

[3] Com. Ex. 417 G: Letter dated May 2, 1933, Rooney to Johnson.
Com. Ex. 422 M: Letter dated May 2, 1933, Rooney to Struckmann.

In his letter to Struckmann he also enclosed a copy of Aetna's announcement and asked for any suggestions or comments. Rooney said this about Huron's announcement:

> "* * * we felt that our marketing plan covering the trucking of cement to be of such a nature that it could be readily followed by the industry in Michigan generally, and of such character as to develop that which is most desired—stability.
>
> Our trucking plan was devised to cover a definite area within certain County limits surrounding our plants—both in Wayne County and our new plant at Saginaw, Michigan. The plan was followed substantially in every respect and considered sound and feasible by most cement companies operating in the area, but we found considerable confusion in the minds of the public as to just what the Aetna plan meant. This same confusion still exists in the minds of other cement companies operating in the field.
>
> We believe our plan to be a clear and concise marketing method—easily understood, which was formulated in an honest attempt to arrive at stabilization. There are certain generally known types of business that are sold direct in Michigan. However, our plan was devised with the intent of stabilizing the price to the dealer—which would enable him to establish his own resale price in his own community, without any attempt on our part to control it." (Com. Ex. 422 M-N)

There followed some correspondence between these parties and others. Struckmann turned over the two announcements to Neylan, his assistant sales manager, who wrote a lengthy analysis of them. Struckmann sent a copy of Neylan's analysis to Rooney.[4]

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[4] Com. Ex. 422 i-K: International (Lone Star) interoffice memo dated May 8, 1933, Neylan to Struckmann analyzing the two plans.

Com. Ex. 422 G-H: Letter dated May 10, 1933, Struckmann to Rooney enclosing Neylan's analysis.

Neylan also wrote a long letter to Cree, Aetna's Sales Manager, who had evidently received a copy of Neylan's analysis,[5] and Hogan, successor to Struckmann as President of International (Lone Star) sent a copy to Rooney with the comment:

> "Because of your interest in the Michigan situation, thought you might wish to read the enclosed. You understand we have no direct interest in the trucking situation." (Com. Ex. 422 A)

Because of its thoughtful consideration of the problems created by truck delivery Neylan's long letter to Cree is set forth almost in full:

> "The limitation imposed under the plan as outlined by your company, approximately fifty miles, cannot possibly be considered as anything more than an indefinite statement. The wording of the notice itself fails to define clearly the trucking limits and we believe you will agree that the words 'approximately fifty miles' may mean forty-five miles or may mean sixty miles. The only limitation placed on the trucking distance is that feature which provides that the cost of trucking will not exceed the cost of delivery by rail.
>
> This we consider a structural weakness since it opens up, with perfect propriety, a claim by a dealer or contractor located any distance from the plant, that he is entitled to trucking service because he can provide trucking facilities from the mill to destination at no greater cost than the transportation cost by rail. Experience has demonstrated that, under certain conditions, cement can be trucked as high as one hundred miles from a mill at a cost no greater than the cost by rail.
>
> In our opinion there is only one way in which territorial limitation can be properly placed with respect to trucking and that is by clearly defining it, either by county lines or by township lines,—in other words, making the limitation apply geographically rather than by mileage.

[5] Com. Ex. 422 B-F: Letter dated June 16, 1933, Neylan to Cree.

Many attempts were made to work out some plan which would more nearly approach the point of equality as between the truck and rail at such points as Oswego, Toledo and Cleveland. Failure resulted until the trucking area was reduced in each instance to a territory clearly defined, either by county lines or by township lines and limited to an area considerably less than fifty miles regardless of the relationship between the truck rate and the carload rate.

We believe you will agree that a trucking radius of fifty miles around any one mill embraces an area which, if applied to all mills, would virtually have the effect of covering the greater portion of the State of Michigan. We believe you will likewise agree that if the trucking plan, as outlined by the Aetna Company, becomes a recognized structure, the same privilege must be extended to other mills within the state should they feel it necessary to meet your competition. This would result in the overlapping of trucking areas from a number of plants, increasing the difficulty of the Michigan plants and in addition would involve out of state producers whose efforts to secure business could only hopelessly complicate the whole situation. This to us is perfectly obvious and we feel sure if you will but locate the various Michigan plants on a map and visualize what your plan would mean if generally adopted you will agree that it would not only hopelessly involve your local mills but would likewise involve out of State producers to say nothing of extending trucking into territory where at present it does not exist.

We cannot agree with your interpretation as to the effect of two prices, one based on truckload deliveries to points where rail sidings exist and the other to points where no such sidings are available. We are still of the opinion that any such plan is foredoomed to failure because of its inherent weakness. In the first place, the higher price from the standpoint of competition becomes a negligible factor for the reason that the truckload price, based on deliveries to jobs or warehouses where sidings ex-

ist, becomes the prime competitive feature and is the one thing which your competitor must attempt to match. In those cases where competitors have truck facilities, they will attempt to match your competition by truck, but those competitors who do not feel able or willing to compete on a truck basis must necessarily attempt by some other means to equal the service which you are giving, and it is this point which we stress as being the objectionable feature of trucking.

It is, in our opinion, absolutely impossible to approach a point of equality of service by utilizing two means of transportation diametrically opposite to each other from the point of service performed. The truck delivered price possesses an advantage which cannot readily be overcome by a carload shipper and there is no means available, or at least it has not yet been found, to make the two services comparable. Equality as it relates to our business consists of equality of final cost to the purchaser at the final delivery point. Delivery by truck injects an element of uncertainty as to final cost, and your competition is forced to estimate or guess what it must do to equal the services performed by the truck shipper. This uncertainty is the root of all evil, and it can never be corrected until the truck is subject to some measure of control, either by the various States or by the Federal Government.

Our Company recognizes the economic value of the truck as a medium of transportation but experience has shown it to me unwise to attempt to take advantage of the economies offered until some means is found to apply similar regulatory measures to the truck as now apply to other forms of transportation. In other words find some means which will eliminate the element of uncertainty of cost which now exists.

We are perfectly willing, therefore, to dismiss that portion of your trucking plan which provides for a 10¢ higher price at points where no rail facilities exist. In the first place, we cannot visualize any dealer or contractor paying 10¢ per barrel higher for deliveries by truck at a warehouse located three or four blocks away from a team track

delivery when this dealer at a lower cost can perform the service himself. Neither can we visualize any measure of control within the power of a manufacturer to prevent a truckman from delivering at that warehouse when the service involved, so far as the truckman is concerned, does not involve any greater expense than is required to make delivery to a warehouse equipped with rail facilities. The result would be that dealers or contractors would order a station where facilities exist for rail delivery and would divert to their warehouse or to a job where no rail facilities exist without the knowledge of the company which attempted to rigidly adhere to the provisions of your plan and with the certain knowledge of the competitor who did not agree with your plan or who saw fit to waive that feature on the ground that the cost of service in the second instance was no greater than that which the first entailed. If the purpose of this revision was to permit carload shippers to compete on jobs or at dealers' warehouses where no rail facilities exist, the division of tonnage or the amount of business which would be left to the carload shipper would, in our opinion be so small as to make it an idle gesture.

We feel that the two price structure cannot possibly survive,—first for the reason that the amount of business which will move on the higher price will practically be negligible in quantity; second for the reason that within the area prescribed absolute control of the movement of trucks cannot possibly be accomplished and, third, because of the competitive feature which the carload shipper must recognize in attempting to match your service. This feature is not the higher priced business but the business which you will deliver at the carload price by truck which, after all, represents the bulk of the business offering.

The plan further lays you open to claims on the part of dealers or contractors located within a short distance from team tracks that you are discriminating against the dealer or contractor who may have a considerable investment or may own outright, a large piece of property not provided with

side track facilities, but located only a short distance from a public team track, in favor of a small dealer who may lease a small piece of property on either railroad owned land or privately owned land equipped with a side track. We believe the strain would be too great for the cement industry to stand if it became a question of service a small dealer or contractor with side track facilities at a price 10¢ lower than a large and powerful dealer or contractor located a short distance from a public team track but possessing no side track facilities of his own.

[Italicized part quoted in Fdgs. Par. Eleven (d)]

Our company has perhaps the greatest number of plants located close to large consuming centers, and our company is probably better equipped for truck deliveries than any other company in the industry. Yet we have found it absolutely impossible to evolve any plan, and we have tried many, which will permit the use of trucks as a medium of transportation in their present uncontrolled state without seriously affecting our price structure or our earning capacity.

The so-called 'Oswego plan' or 'Cleveland plan', while not perfect, at least offers a minimum of difficulty as compared with the other plans which have been tried in the past. At Cleveland, for instance, trucking is limited to one county and the price delivered by truck is 5¢ higher than the price f.o.b. cars. Within the limited area of Cuyahoga County, into which trucking is limited from Cleveland, and Lucas County, where trucking is limited from Toledo, the 5¢ surcharge closely approximates the actual cost of moving cement from the nearest rail siding to any destination within the county. The same is true, to a lesser extent however, around Oswego, yet at Oswego the condition is not so aggravated as to prevent the carload shipper from closely approximating the competition offered by those operating on a trucking basis and makes it possible, to some extent, for the carload shipper to compete without destroying the natural advantage which the local mill or silo should enjoy.

As we have previously stated, this plan is not by any means perfect. There is only one way in

our opinion to solve the problem and that is to eliminate trucking entirely until such time as the truck is subject to regulation as a common carrier. This step, in our opinion, instead of representing a step backward, represents a defensive move and one which it takes courage to enforce. Such a stand will undoubtedly hasten the day when the truck interests will put their house in order and make it possible for Industry to fit them into place where they rightfully belong, as a recognized but properly supervised and controlled medium of transportation. After all, the line of the least resistance is to load a truck at a plant and let it go where it will, but we have found by experience, and sad experience, that the line of least resistance is likewise the line of lessening profits. There is only one excuse for our existence and that is to use whatever talents we have toward building up the standard of the industry to the points where it reflects in the earnings of our particular company.

Regardless of the merits of any plan, its final test is whether or not we can live in harmony with our neighbors and whether or not, operating under such a plan, we can continue to secure business on a basis which will enable our company to earn a reasonable profit. Our experience with trucking has shown that in its present uncontrolled state the ultimate result is the reduction of earnings to the vanishing point." (Com. Ex. 422 B-F)

A lengthy correspondence also took place on the same subject during May and June, 1933 between Johnson, President of Aetna in Boston, and Rooney of Huron in Detroit.[6]

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[6] Com. Ex. 417 F: Letter dated May 4, 1933, Johnson to Rooney.
Com. Ex. 417 H-I: Letter dated May 10, 1933, Rooney to Johnson.
Com. Ex. 417 J-K: Letter dated May 29, 1933, Johnson to Rooney.
Com. Ex. 417 L: Letter dated May 31, 1933, Johnson to Rooney.
Com. Ex. 417 o: Letter dated June 15, 1933, Johnson to Rooney.
Com. Ex. 417 N: Letter dated June 19, 1933, Rooney to Johnson.

There is no evidence that anything came of all this correspondence. Crapo, Vice President, Huron, testified as follows:

> "Q. Now, some reference has been made, Mr. Crapo, to the Aetna and the trucking practice of the Aetna, and of the Huron.
>
> Can you state whether or not at any time in the history of your business, the trucking practices of the Huron and those of the Aetna coincided? A. I have no recollection that they ever did coincide.
>
> Q. Is your recollection to the contrary, that they never did coincide? A. That is quite strongly my opinion." (Tr. 11276-77)

The term "trucking practices" was used to include the area over which truck delivery is made, the charges for trucking and the practice of Huron to offer either truck or rail delivery to all its customers.[7]

MEETING IN CHICAGO: SUMMER OR FALL OF 1933

Cree, former Sales Manager of Aetna, testified that the rail shippers tried to develop what they thought would be a better plan of trucking and out of that came several meetings on trucking.[8] He identified an unsigned, undated memorandum entitled "Notes On The Chicago Meeting" as a memorandum prepared by him following a meeting in Chicago in the late summer or early fall of 1933.[9] He testified that Rooney of Huron, Luck of Peerless, Stone of Universal Atlas, John of Medusa, Loucks of Petoskey and Colburn of Marquette were present.[10] Fellows, Sales Manager of Alpha, testified that Cree of Aetna, Rooney

[7] (C) Tr. 11277.

[8] (C) Tr. 607.

[9] Com. Ex. 23 A-B; (C) Tr. 609-12.

[10] (C) Tr. 612-13.

of Huron, Hughes of Lehigh and Mr. Rader were present but he did not recall that Stone or any one else from Universal Atlas was present.[11] Fellows said this:

> "Well, the meeting that I recall in Chicago certainly did not last two days, or even a day, so far as that is concerned, so I don't know whether it was this same meeting or not; but the meeting I attended,—and Mr. Cree of the Aetna Company was present,—we took up the same situation that prevailed in Wisconsin analogous to the situation in lower Michigan.
>
> There was trucking going on up in Wisconsin, from both Milwaukee and Menominee, Green Bay and Menominee, and we were interested in that, and we were trying to work out the same kind of a provision applying to that territory, the competitors in that territory, to put into the Code[4] that we were trying to do in this meeting over in the Book-Cadillac Hotel." (Tr. 25813)

Lucas, Vice President, Petoskey (identified as "Loucks" in the transcript) was shown Com. Ex. 23 A and testified:

> "Q. Do you recall any meeting on trucking in Chicago that you attended at any time? A. No. I recall some discussion of trucking in a group prior to the—during the formation of the code, but there certainly was no two-day meeting such as this speaks of here, and apparently that could not be referring to the same thing.
>
> Q. Did you ever see that document before this case started? A. No." (Tr. 38782-83)

Cree's "Notes On The Chicago Meeting" reads in part as follows:

> "At the Chicago Meeting the subject of trucking of cement was on the surface the predominant feature, this however, was a cloak for some prob-

[11] (R) Tr. 25929-30.

[4] Reference is to the NRA Code.

lems which reflect wholly on the Aetna Company's program of progress.

The Meeting lasted two days, nothing definitely done but if a definite understanding is going to be prevalent, this meeting played its part.

Aetna's idea of trucking was based upon the theory that the main endeavor of a cement industry should be to the proper maintenance of a definite destination price. This definite destination price can be accomplished only under a plan of higher equalization of trucking and rail shipments. The higher equalization develops this definite destination price in the open, allowing any plan of delivery to be therefore, applicable to any district, eliminating the necessity of worry among competitors as to how cement is brought to any given destination. And, so with these thoughts in mind, the Aetna Company presented a plan which was admitted by the Alpha and others to be the best plan toward this higher equalization goal, that has been submitted." (Com. Ex. 23 A)

MEETING IN DETROIT: BOOK-CADILLAC HOTEL, OCT. 24, 1933

An unsigned document dated October 24, 1933 and entitled "Memo Of Meeting At Book-Cadillac Hotel" and an unsigned document dated October 28, 1933 and entitled "Memorandum" were identified by Cree, former Aetna Sales Manager, as papers from files that were delivered to him after his discharge.[12] Johnson, President of Aetna, testified that he and Cree were present from Aetna and Rooney from Huron but he was unable to recall the names of any others who attended.[13] Rooney testified that Stone of Universal Atlas, Johnson, Cree and Lingeman of Aetna, John of Medusa and Stroh of Wabash came in later.[14] Fellows, Alpha Sales Manager, testified that he attended the meeting and said:

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[12] Com. Ex. 22 A-B; (C) Tr. 586-87.

[13] (C) Tr. 991-92.

[14] (R) Tr. 33703-05, 33714-15.

"Well, this meeting over in the Book-Cadillac Hotel was held in the latter part of 1933, when we were trying to get certain provisions into the Code, and we, as car shipper over into Michigan, were very much interested in the trucking situation over there.

Trucking was being done over there direct to destination, and we, as car shippers, had no way of meeting that. What we were trying to do in this meeting was to talk over some provision that we might put into the Code so as to meet that competition over there, make it easier for us to meet, so that we could get a litfle more money out of it." (Tr. 25812)

The document entitled "Memo Of Meeting At Book-Cadillac Hotel" reads in full as follows:

"Proposition made by Mr. F. R. Johnson after discussing the first plan was that the Aetna Company would agree to five (5) cents a barrel differential to car load price delivered at dealer's permanent warehouse or on the sidings.

Ten (10) cents per barrel extra on other deliveries.

No unloading from the trucks at any place by the truck drivers.

Sixty (60) barrels minimum.

Mr. Rooney opposed this and says he is in favor of his New York and Ohio plan which works out satisfactorily; namely:

Five (5) cents per barrel extra for trucking to destination above the car load destination price.

If a man comes to the mill and picks up a load he is to be charged his destination price plus five (5) cents per barrel.

Sixty (60) barrels minimum.

This later plan was approved by all except the Aetna Company for a trial for three (3) or six (6) months.

As it stands at this writing (3 o'clock P. M. October 24th, 1933) it is left for F. R. Johnson and the Aetna Company to decide whether they will agree with all the others in the Rooney plan or not.

The Meeting was composed of the prominent car load shippers and also those interested prominently in the trucking of cement.

The question of trucking in Michigan was the principal thing taken up. Then they took up the question about Wisconsin and also referring to Grand Haven, Green Bay and Menominee. The Aetna Company told them clearly that they would continue to ship by water to these places. Their point of contention only was that we should have dealers and not distributors and they asked us to consider that and make that change." (Com. Ex. 22 B)

The document dated October 28, 1933 and entitled "Memorandum" purports to state Johnson's conclusions following the meeting. It reads in part as follows:

"* * * I have come to the following conclusion:

That it would be advisable for you, Mr. Lingemann, to notify Mr. Rooney, Vice-President of the Huron Portland Cement Company, that the Aetna Company will co-operate with him and others in the new trucking plan—the same should commence November 1st—but we put in this reservation:

That if we find at Grand Haven, Green Bay or Menominee it works to our disadvantage, and we are definitely sure we will lose business or are losing business by charging 5¢ a barrel more, where cement is delivered by truck than by railroad, then we shall adopt our old policy, which we think to-day is correct: namely, of equalizing rail and trucking rates.

We are willing to give this a three-months' trial.

We are doing this to show our disposition and desire to work with the Huron Company and others.

We shall endeavor to sell the idea of service which we can offer by our trucks and get the 5¢ a barrel more; but if we cannot and we lose business, we will go back to the equalization rate plan.

We still feel that the plan offered by F. R. J. at the meeting October 24 was feasible and workable, but we realize that there were some difficulties as to saying when the 10¢ additional should be charged." (Com. Ex. 22 A)

Johnson, called as a witness for the Commission, was confronted with these documents and testified:

> "Q. Did you make a proposal at that meeting to change the Aetna Company policy with regard to the trucking of cement? A. That proposal as I remember it, was written by Cree. He handed it to me to read, and I said, 'That sounds pretty good, Cree; I think I will read that and let's see if we can get some common ground on this trucking situation.' Now, I called it my baby, but I think that the thing was really written by him, for this reason,—I was not enough in touch with the details of trucking or any of those things to sit down and draft out a trucking plan for the State of Michigan. It would be idiotic for me to do it, and I think he drew that up and I said, 'OK, Let's read that and see how it hits.' " (Tr. 993)

Johnson was unable to state what Rooney's New York and Ohio plan was.[15]

> "Q. Did you later agree to make your trucking policy the same as that which Mr. Rooney had proposed as the New York and Ohio plan? A. No, and I think that this whole thing went by the board and never went through. That is as I have been informed." (Tr. 994)

He was also unable to state what the Petoskey plan was.[16]

On November 1, 1933 shortly after this meeting Lingeman, Aetna's General Manager, wrote to Johnson in Boston in part as follows:

> "Mr. Rooney of the Huron phoned this morning and made an appointment for the discussion of your proposal—that is, the five cent differential. I informed him that I talked to you yesterday on the

[15] (C) Tr. 993.

[16] (C) Tr. 995.

three months as against the six months and stated that you again informed me that the terms of this proposal was to be three months. I also volunteered the information that you were writing Mr. Stroh a nice letter and this pleased him very much. He stated that Mr. J. B. Johns had asked him to attend a meeting down in Cincinnati to-morrow. The reason for Mr. Rooney's going is that Mr. Jennings of the Wabash is going to be there and they thought it would be an opportune time to talk to him and they thought they had a good right to approach him on account of your proposal, showing your willingness to bring things to a head." (Com. Ex. 22 C)

Johnson testified that he did not have any discussion with Rooney about the 5¢ differential and he did not know whether he wrote Stroh of Wabash "a nice letter" as stated by Lingeman. He also testified that Stroh was not present at the meeting.[17]

Rooney testified about this meeting as follows:

"Well, in so far as I was involved at that meeting, there was a luncheon at which these members of the industry had gathered, and I was called to come over to the hotel and have lunch with them. The discussion at the luncheon was the difficulties that were being encountered by the Wabash and Aetna Company. They were at swordspoint apparently, and there was not a very friendly relationship existing, and they wondered if there was not anyone that could act as good Samaritans and see if we could not develop a more friendly relationship between them." (Tr. 33704)

Further:

"* * * I went back to my office after the luncheon to try and do some work, and they determined that they would then go over to Mr. Stroh's office, and then they insisted upon me accompanying them, so I went over, after some protest.

[17] (C) Tr. 994.

Q. What was the outcome of the meeting? A. Well, it would be a rather difficult thing—I was a very interested bystander. I had nothing to say, nothing to offer; I just watched. I was interested in watching Mr. Stroh's sphinx-like expressions, as they talked to him, and he continued that throughout the time that they were discussing this, and then they all left and shook hands, and what the result was I don't know; it didn't affect me particularly, and I wasn't particularly interested.

• • •

Q. The fact of the matter is that the dispute between those two companies was affecting the prices obtainable by the other companies, isn't that so? A. No—weren't any prices discussed.

• • •

Q. What do you mean? That the meeting was—had no effect in solving any of the difficulties or problems involved? A. I don't think it did. I never saw any indication of it. I think they were quite satisfied to get around to a point where they would shake hands, that was something." (Tr. 33706-08)

As to both the Chicago meeting and the Detroit meeting, Fellows, Alpha Sales Manager, testified:

"Q. Well, now, I noted that on both of these exhibits there was some trucking plan discussed as having evolved from these meetings. What actually happened,—was any plan with respect to trucking in Michigan or Wisconsin developed from either of these meetings? A. No, sir; there was not, no plan, I didn't hear any plan offered at all, just a general discussion as to what might be done, and what might be included, and what we might be able to get into the Code provision. I know of no plan.

Mr. Cree speaks of a plan here, and so forth, but I don't know, I never heard of it.

Q. Now, in your experience, what happened after these meetings,—what did you find the situation to be in Michigan and Wisconsin? Had it changed in any way? A. My recollection is that there was no

change in the situation at all as far as trucking was concerned. We were interested at that time in getting provisions in the Code that would take care of the situation. My recollection is that there was nothing appeared in the Code when it did come out, and subsequently, in order to meet that competition over there, we used—we used one of the buildings—one of the dismantled buildings in our Belleview plant as a warehouse, and trucked out of that, and have been trucking out of that ever since.

With reference to the Wisconsin situation, subsequently we opened a warehouse in Milwaukee and another in Green Bay, and trucked out of both of those places, and still are, in an effort to meet the trucking situation created by silos and warehouses of competitors who have silos and warehouses at those points.

Q. Now, without asking a lot of questions on both these meetings, let me see if I can sum it up, Mr. Fellows, and ask you one question:

Was there any understanding reached at either of these meetings that you were aware of at all, as to what might be done, or what should be done, or what would be done in the future so as to change this situation at Michigan and Wisconsin? A. No, sir; not at all.

Q. Did you personally ever discuss the subject of trucking at all with Mr. Cree? A. No, sir; I never did." (Tr. 25813-15)

Rooney denied that he entered into any agreement at this point or any other meeting that he attended.[18]

MEETING: NOVEMBER 15, 1933

Cree identified a memorandum of a meeting of November 15, 1933 as a memorandum made by him shortly after the meeting for Johnson and sent to Johnson.[19] The memo-

[18] (R) Tr. 33665-67.

[19] Com. Ex. 1496 A-C; (C) Tr. 11520-21.

randum lists ten company names and Cree testified that the following individuals were present: himself of Aetna, Calvin of Peninsula (Consolidated), Mooney of Wolverine, Lucas of Petoskey, John of Medusa, Rooney of Huron, either Russell or Luck of Peerless and he was unable to recall who was there from Alpha and Marquette and he thought Cronkrite might have been there from Universal Atlas but he was not sure.[20]

Cree also identified a document entitled "First Plan. The Plan For Trucking Cement By Cement Manufacturers In The State of Michigan" dated November 14, 1933 and a second document entitled "Second, or Revised Plan" with the same date[21] as being Huron plans that were distributed at this meeting by Rooney and were discussed but that neither ever became effective.[22]

Cree's memorandum of the meeting is long. The opening paragraph is as follows:

> "Mr. Rooney of the Huron Company presented his original plan as of the meeting in Detroit, in however, a very much revised edition. This was not acceptable to either the car or truck shippers in some very important details, and so was again revised. (NOTE: Aetna's attitude was not too critical, as it was evident at all times that this new plan would not go through in its entirety.) Finally, a draft was made of the developed revision and happened to be presented just as Mr. Jennings of the Wabash entered. Mr. Jennings then became [*sic.*] of the discussion and his comment was one of criticism and he simply stated that their Company was going to sell cement and absorb anything to meet a competitive price. He offered no suggestion—only to speak of the elimination of trucking." (Com. Ex. 1496 A)

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[20] (C) Tr. 11521-23.

[21] Com. Ex. 1497 A-B.

[22] (C) Tr. 11528-33.

The reference to the "original plan" presented by Rooney in Detroit may be to the so called New York and Ohio plan favored by Rooney at the meeting at the Book-Cadillac Hotel October 24, 1933. See Com. Ex. 22 B quoted, *supra*, pp. 1686-87.

The last paragraph of Cree's memorandum reads as follows:

> "So, we are, therefore, still inclined to feel that we have endeavored by our ten cents up and by raising the minimum delivery have fairly met the impulsive demand for equalization. The plan that we put forth was based upon a fair and higher equalization, and regardless of criticism, could have easily been interpreted by those in tune with the thought that should be prevalent now. We think and believe that the bigger car shipper missed on this one, by not getting behind the Aetna plan." (Com. Ex. 1496 C)

The document identified by Cree as Huron's "Second, or Revised Plan" reads in full as follows:

> "Truck deliveries of package cement will not be made by manufacturer in quantities of less than full truckload lots of sixty (60) barrels minimum to any one customer or destination.
>
> Bulk cement deliveries shall be made in full truckload lots only.
>
> Under no circumstances will a minimum truckload of sixty (60) barrels of cement be split for delivery to two destinations for any one customer nor between two customers.
>
> Truck deliveries shall be F.O.B. truck at dealer's warehouse or job, all unloading to be done by the receiver. The truck driver shall not be permitted to leave his truck for the purpose of assisting to unload.
>
> To compensate for the additional service rendered, due to the smaller quantities involved in truck delivery and the service rendered in taking the cement closer to the point of consumption, five cents (5¢) per barrel shall be charged above the car-

load delivered price at the railroad point nearest to the point of delivery, for all truck deliveries.

No truck deliveries shall be made to points where the trucking rate to be paid is in excess of the railroad rate to the nearest rail delivery point.

Only trucking companies regularly engaged in the transportation of commodities by truck and not affiliated with any dealer or contractor shall be employed by cement manufacturers to make their truck deliveries.

Should a customer come to a cement plant or warehouse operated by a Cement Company, with his own equipment, he shall be invoiced at his destination price, plus the five cents (5¢) for truck delivery in the same manner as though the delivery had been made by the Cement Company to such customer's destination.

All terms and conditions of sale are to conform to the general practice for the sale of cement." (Com. Ex. 1497 B)

There is no evidence that any of these plans were put into effect by any of the participants in any of these meetings. Cree, as noted above, testified that none were put into effect.

5. Wisconsin and the Upper Peninsula of Michigan: 1935

CHICAGO MEETING: MARCH, 1935

Cree identified Com. Ex. 2202 as a Memo dated March 12, 1935 of a trucking plan to be used as a basis of operation in the Wisconsin district. He testified that it was sent or given to him at the time of a meeting at the Lehigh office in Chicago attended by himself of Aetna, Rooney of Huron, Colburn of Marquette, Hughes of Lehigh, Lucas of Petoskey and a representative of Universal Atlas whom he could not recall.[1] Colburn, Vice President, Marquette

[1] (C) Tr. 12554-55.

denied that he attended any such meeting and said that "Marquette was in nowise interested in that plan or any other similar plan, either directly or indirectly."[2]

Com. Ex. 2202 lists 11 counties around Milwaukee, 6 around Manitowoc and 10 around Green Bay and Menominee. Cree testified that Aetna finally filed this plan with the Institute and said that previous to this Aetna had been trucking into the Upper Peninsula of Michigan and to points beyond these named counties.[3]

Cree also identified an unsigned memo dated July 9, 1935 (Com. Ex. 2203) as a "notice" sent to Aetna which, he was under the impression, was sent by Universal Atlas but he could not say definitely where he got it. It was found in Cree's files.[4] The memo says that a dealer picked up 10 barrels of cement at Aetna's warehouse at Green Bay and the writer, after commenting that evidently Aetna's instructions as to a 30 barrel minimum are being disregarded, asks "Is this going to continue to be your practice?" Cree testified:

> "Well, I think I just kind of ignored the thing after I investigated, that there wasn't much to it." (Tr. 12567)

Stone, Vice President, Universal Atlas was shown Com. Ex. 2203 and testified that he did not write it and that he had made inquiry in the Universal Atlas organization to see whether anyone wrote it but he was not allowed to name those of whom he inquired.[5]

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[2] (R) Tr. 39041.

[3] (C) Tr. 12556.

[4] (C) Tr. 12557, 12559-61.

[5] (R) Tr. 35213-14.

BOSTON MEETING: OCTOBER 12, 1935

On October 10, 1935 Johnson wrote Cree in part as follows:

> "In regard to that talk which we had with Mr. Cronkrite, I want to follow out every line of good endeavor in the Upper Peninsula, and have the same splendid reputation that we enjoy in the lower part of Michigan, as far as our 'playing ball' one hundred per cent on the square. What is necessary to do, I know you will get right at it with Oscar and straighten out the whole situation. It is my wish, my prayer and, yes, my definite request. It needs immediate, persistent and hard work; but I know you and Oscar, in your broad-minded ways, can do it; so 'go to it', my boy; and that will be of great help to me and to the Aetna Portland Cement Company." (Com. Ex. 33)

Cree testified that Cronkrite was in the sales department of Universal Atlas in Chicago and was asked about the talk referred to in the letter. He testified:

> "Well, I cannot remember the actual conversation, the details, only that he was pressing to have us control our trucking in the Upper Peninsula and have us be sure that our distributors, Mr. Smith, kept up 100 percent to the trucking regulations as to the delivery of cement and the amount on each load, and so forth.
>
> Q. What do you mean by the trucking regulations? A. Well, there was a prevalent trucking plan in Wisconsin, then.
>
> Q. What was it? A. Well, it was a plan that described the minimum amount of cement on a truck as of 60 barrels of cement, and it described also the method of delivery as to the cement not being taken to the job but to the dealer's warehouse.
>
> Q. And in that last respect, that ran counter to your method or plan? A. In the Upper Peninsula, yes." (Tr. 681)

As to Johnson's request that he and Oscar (Lingeman) get right at it and straighten out the whole situation, Cree testified:

> "Well, I don't think I showed any particular speed in getting at the thing, but some time after, there came the development of those trucking meetings that I believe you have spoken about." (Tr. 682)

Cree next received a memorandum dated October 25, 1935 from Johnson. Cree wrote on the bottom the words "Meeting in Boston, Johnson, Conkrite, etc." The memorandum deals with Aetna distributors and, as to trucking, reads as follows:

> "In shipping cement into the upper Peninsula, it should go in carload lots, and no truck deliveries be made." (Com. Ex. 34)

A copy of this memorandum (Com. Ex. 417 GG) was produced from Huron files in response to a subpeona[6] and Rooney, Vice President, Huron identified a notation "F. R. Johnson" as being in his handwriting. He had no recollection as to how he obtained the memorandum and denied that he had attended any meeting in Boston with Johnson.[7]

Johnson, Aetna President, was shown Com. Ex. 34 and identified it as a memorandum prepared by him of a meeting between himself, Cronkrite and John of Medusa held at Johnson's office in Boston on October 25, 1935.[8] He said that he had not invited them to come and added:

> "Let me say please, that is it not an unusual thing for a representative of the Universal Atlas or any other cement concern who was good enough to come down to Boston, to run in and see me, and I did talk to them. Conkrite had done it before and Mr. Johns had done it before. So it was not an

[6] (C) Tr. 2878-79.

[7] (R) Tr. 33710-11.

[8] (C) Tr. 990, 1008.

unusual thing for men to come into the office and talk to me." (Tr. 996-97)

On the witness stand his attention was directed to Com. Ex. 34 and he testified:

"Q. You say further in this Exhibit 34, 'In shipping cement into the Upper Peninsula, it should go in carload lots.' A. Yes, sir.

Q. (Reading) 'And no truck deliveries to be made'. A. I did.

Q. Was any one objecting to your truck deliveries up there? A. God, I was the worst objector.

Q. Was any one else objecting? A. No, I cannot say that there were. I think Conkrite said, 'We do not see how you can make any money shipping it that way, but perhaps you can.'

Q. It was discussed at that meeting, at any rate? A. It was.

Q. You said further, 'All of this seems to be a step necessary for better harmony and better understanding.' A. Yes, sir.

Q. Better harmony with your competitors? A. No, sir, better harmony between my organization and an understanding with me and a harmony to me, and by God they were out of step on the harmony game.

Q. Wherein did you consider the trucking of cement in the Upper Peninsula was detrimental to the Aetna Company? A. Because I felt, although I could not prove it, that the thing was costing us more than we were getting out of it." (Tr. 999)

Further:

"While we were there, I was talking to them and they were talking to me about the question of the northern peninsula, and I said, 'We are shipping goods up there by boat, and I am very much disturbed over our whole warehouse proposition. I have my doubts as to the feasibility of it; I believe it is a money-losing game, and I believe we are not right.'

Q. Did you volunteer that without their undertaking to show you wherein it was not good policy?

A. Yes, I volunteered that myself, because that thing was uppermost in my mind.

Q. You already had your mind made up on it? A. I had it in my mind and I had not my mind made up on it, but it was in my mind. My mind was made up later on. Conkrite said they had shipped by rail and it was more profitable. Having all of this loss staring me in the face, I said, 'We will ship up there by rail, and that is the way we are going to go.' That was the thing." (Tr. 997)

Cree identified a memorandum made by Miss Fowley, Aetna stenographer, of a telephone conversation between Cree and Cronkrite of Universal Atlas shortly after the meeting.[9] In so far as the conversation dealt with the Upper Peninsula it is as follows:

"Mr. Cree: What did he tell you we would do?

Mr. Conkrite: 'Read your memo!! (Very angry) it says that you will give up trucking in the Upper Peninsula and that if something cannot be worked out satisfactorily in regard to our distributor Mr. Smith, That we, (meaning the Aetna Company) will have to get along without him. You have the memo, what does it say about trucking in the Upper Peninsula?'

Mr. Cree answered him the best he could under the circumstances and Mr. Conkrite said 'all right, I don't give a dam one way or the other about it.'" (Com. Ex. 35 B-C)

Shortly after this on October 28, 1935 Cree wrote to Lingeman with reference to Johnson's memo of the Boston meeting and a further meeting that Cree had held with Cronkrite and Smith (Aetna distributor) in Chicago at which Cree said he:

"* * * proposed to Mr. Conkrite the adoption of the Wisconsin plan of trucking for the Upper Peninsula. This plan eliminates over 90% of the trucking

[9] Com. Ex. 35 A-C; (C) Tr. 690-93.
Fowley, Clerk, Aetna (C) Tr. 877-79.

in the Upper Peninsula and inasmuch as the dealer trade is a very small part, it practically is the same thing as eliminating trucking in its entirety but constructively it is better than the elimination of trucking, inasmuch as we all know that trucking can not be entirely eliminated and this plan saves the trucking on a constructive basis. Mr. Conkrite admitted this and he was for it 100%. He no doubt, had planted the thought that it was a stepping stone as we suggested to better improved trucking condition in the Lower Peninsula. * * *

* * * *

The Cement Institute on receipt of our new filing for the Upper Peninsula expressed their appreciation of the constructive step and the statement was made by them and they knew everyone would immediately follow suit." (Com. Ex. 37 A)

Cree testified that George Reiter of the Institute made this last statement to him when he talked to him over the telephone.[10]

AETNA'S FILING OF NOVEMBER 7, 1935

Com. Ex. 1494 A is an unsigned undated paper reading as follows:

"In order to conform to that part of memorandum October 25, 1935 which has reference to method of delivery in Upper Peninsula action of this nature should be taken. It is therefore suggested that this filing be made at an early date." (Com. Ex. 1494 A)

and Com. Ex. 1494 B is a typewritten slip reading "A. C. Cronkrite." Cree identified these as papers coming to him through the mail from Cronkrite.[11]

Com. Ex. 1494 C (also Com. Ex. 39) is an unsigned letter addressed to Reiter, Chairman, Trade Practice Committee of the Institute dated November 5, 1935. Cree testi-

[10] (C) Tr. 709-10.

[11] (C) Tr. 11490-91.

fied that he evidently received it from Cronkrite.[12] Com. Ex. 1494 C reads in part as follows:

> "In *our* filing, as per your notice dated October 17, 1935, we advised of intent under certain terms and conditions to make truck deliveries in Upper Peninsula of Michigan.
>
> We now file intent to *discontinue* all trucking in Upper Michigan except within the corporate limits of Menominee, Michigan. Trucking within this special area (Menominee) to be governed by the following terms and conditions:" (Com. Ex. 1494 C)

and those terms and conditions are then set forth.

On November 7, 1935 Aetna filed a notice with the Trade Practice Committee in substantially identical language as the filing proposed by Cronkrite.[13]

CHICAGO MEETING: DECEMBER 6, 1935

On December 6, 1935 Johnson called a meeting in Chicago at which the following were present:

> Mr. Ben Calvin and Mr. William Storey, of the Consolidated Cement Co., Jackson, Mich.
> Mr. J. B. John and Mr. Harry Lucas, of the Medusa and Petoskey Cement Companies.
> Mr. Burt Rooney of the Huron Cement Co.
> Mr. Frank Mooney, Sales Manager of the Wolverine Cement Company
> Mr. Archie Conkrite (who came in later), of the Universal Atlas
> Mr. Jennings of the Wabash (who likewise came in afterwards)
> Mr. D. C. Colburn, Vice Pres. of the Marquette Co.
> Mr. William Russell and Mr. Luck of the Peerless
> Mr. F. R. Johnson, Mr. Oscar Lingemann, and Mr. Harold Cree, of the Aetna Company. (Com. Ex. 45 A)

At this meeting Johnson read a document entitled "Policies of the Aetna Portland Cement Company" (Cree, Tr.

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[12] (C) Tr. 11491-93.

[13] Com. Ex. 1494 E; (C) Tr. 11494-95.

742-43) which, in so far as it deals with trucking in the Upper Peninsula, reads as follows:

> "We have agreed that in shipping cement into the Upper Peninsula, it shall go in carload lots, and no truck deliveries will be made.
>
> See our filing, dated Nov. 5, 1935." (Com. Ex. 44 B)

Johnson testified as to why he prepared the statement of policies and read it to competitors as follows:

> "My reason for doing that was that in my opinion, to my knowledge, we had been losing this $700,000, which is a lot of money. My feeling towards my people got to a point where I felt uncertain as to what they were going to do, and I felt that it was incumbent upon me to denote to the trade generally, as well as to my people, what our policies were, not what they were going to be but what they were at that time." (Tr. 1006)

Russell, Vice President, Peerless, was asked about his attendance at this meeting and testified:

> "* * * at a time when I was at a Portland Cement Association meeting in Chicago, Mr. Johnson invited myself to come into a room one afternoon, in the Blackstone Hotel, and in that room there were several men including Mr. Johnson, Mr. Cree, and Mr. Lingemann.
>
> And, at that time, Mr. Johnson read a letter that he had prepared, setting forth certain instructions to Mr. Cree and Mr. Lingemann, and I never was clear in my own mind why he should invite myself and other members of cement groups in, except that he was giving instructions to his own men, apparently, for the purpose of impressing on those employees the necessity of following instructions.
>
> Q. Did you discuss with Mr. Johnson, this letter which he read? A. I did not.
>
> Q. Was there any agreement entered into at that meeting? A. No. There was not, to my knowledge. Certainly not on my part." (Tr. 34402-03)

and on cross examination he said:

> "It was pretty unusual, the situation was. I know I had a feeling of embarrassment. And Mr. Johnson, in reading that letter, gave me the impression that he was talking to Oscar Lingemann and Harold Cree, to get them to do something he had been unable to get them to do, and was apparently using that means of impressing on them the necessity of doing something.
>
> That was my own feeling at the meeting. I know I was very much embarrassed to witness the procedure as it was carried on.
>
> Q. Didn't it impress you as peculiar, Mr. Johnson should have his competitors to hear him lay down the law to his subordinates? A. Yes, sir." (Tr. 34501)

Colburn, Vice President, Marquette in his stipulated testimony recalled that:

> "• • • the Witness Johnson came to the office of Marquette, during December, 1935, in a period when there was a meeting of the Portland Cement Association going on in Chicago and at that time invited Colburn to call upon him at his hotel where he said he was going to have a small group of people get together for a little social gathering in his room, and in response to this invitation D. S. Colburn did call at Mr. Johnson's room, where he saw a number of other people, remembering only by name the witnesses, Johnson, Cree, and Mr. Lingemann, but recalling that others were known to him and were in the cement busines but not remembering their names; he did not on this occasion hear the Witness Johnson read any statement of policy, but at the time when he came in the Witness Johnson was haranguing Mr. Cree and Mr. Lingemann about Aetna's unprofitable investments in warehouses which Lingemann and Cree were said to have established; and he Colburn, was not interested, considered this matter none of his business, stayed only a few minutes and left." (Tr. 39042)

PART VII

WATER DELIVERY

The subject of water delivery is introduced in the findings, Paragraph Twenty-six, by the conclusion of the Commission that the practices of respondents have had the effect of preventing purchasers from utilizing water carriers for the transportation of cement and from obtaining benefits that might accrue from the use of such transportation agencies. The evidence digested in this part is, therefore, confined to that which shows the general extent to which water delivery has been made use of in connection with the sale and delivery of cement, the extent to which use of water transportation represents any cost saving over rail transportation and the extent to which such saving, when it exists, is reflected in cement prices.

A. General Extent of the Use of Water Delivery.

The only evidence showing any composite picture of the overall use of water for transporting cement, is contained in Resp. Ex. 3224 A-C, which consists of several tabulations showing cement traffic handled on various waterways in the United States during the years 1919 to 1935 inclusive, compiled from the records of the U. S. Army Engineers and from port records and is reproduced, in part, at pages 1736-38 to show the ports involved and the tonnage moved in 1919, 1923, 1927, 1931 and 1935.

The following table made up from Resp. Ex. 3224 A-C shows the figures for the years 1919 and 1935.

Area	Water Borne Tons: 1919	Water Borne Tons: 1935
Receipts at 15 ports on the Great Lakes	102,196	428,309
Shipments from 9 ports on the Great Lakes	151,340	435,085

Area	Water Borne Tons: 1919	Water Borne Tons: 1935
Bet. Minneapolis, Minn. and the mouth of the Ohio River	663	170,668
Bet. Cairo, Ill. and Memphis, Tenn.	0	94,581 (1934)
Bet. Memphis, Tenn. and Vicksburg, Miss.	0	13,115 (1934)
Bet. Vicksburg, Miss. and New Orleans, La.	0	20,995 (1934)
On the Hudson River	5,800	138,075
On the Ohio River in the Cincinnati District	5,880	123,033
On the Ohio River in the Pittsburgh District	8,852	52,705
Total	274,731	1,476,566

B. Use in Specific Areas: Demand: Comparative Costs of Water and Rail.

1. Atlantic Coast

Lone Star has for many years maintained a price in and around Washington, D. C. based on the cost of delivering cement to its Washington warehouse by barge from its Norfolk mill. Originally Lone Star was unable successfully to market cement in the District of Columbia despite the establishment of its Norfolk plant in 1928. The railroad freight rate from Norfolk was higher than what Lone Star estimated it would cost to ship cement to Washington by water. The Company finally erected a silo warehouse at Washington equipped for truck loading and to receive bulk cement shipped from Norfolk in its own boats and the Company used the Washington plant for truck and rail deliveries as well as for additional storage of its Norfolk product. Transportation of cement from Lone Star's Norfolk mill to Washington by water gave

it an advantage over competitors, who were selling in Washington through rail deliveries, so far as Lone Star's estimated cost compared with its competitors' rail rates into Washington were concerned. Lone Star reflected this advantage in the lower prices it established in and around the District of Columbia based upon its cost of barge delivery from Norfolk.[1]

Lone Star has also made a few water shipments to the State of North Carolina from its Norfolk mill.[2]

National at Ragland, Ala. has attempted to get some work in Louisiana, and its traffic manager has tried to get rates in there which would enable it to ship by barge. The traffic manager, however, has never been able to get the barge line on the Warrior River to quote a through price from Ragland to Mobile or New Orleans.[3]

Penn-Dixie has made infrequent shipments of cement by water. It has delivered cement by barge to Florida from the Lehigh Valley of Pennsylvania.[4]

Florida has made water shipments from its mill at Tampa to Miami.[5]

2. Great Lakes

Huron has its manufacturing plant at Alpena on Lake Michigan and has erected auxiliary plants for storage and sacking at 11 points on the Great Lakes, the total cost of which was in excess of $2,700,000.00. It built and has used its own fleet of lake freighters, each equipped with specially

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[1] Koch, Vice President, Lone Star (R) Tr. 32867-70. Com. Ex. 1166.

[2] Neylan, Ass't. General Sales Manager, Lone Star (C) Tr. 6108.

[3] Dannelly, Vice President, National (R) Tr. 39582-84.

[4] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38259.

[5] Id., Tr. 38254-56.

designed loading and unloading machinery at a cost of $1,788,000.00, to carry its cement in these steamers in bulk to its various auxiliary plants.[1] From the auxiliary plants, in turn, Huron ships by rail or loads customers' trucks but does not deliver by water to customers. The prices established by Huron for deliveries from its various auxiliary plants are not based upon rail freight from any mill.[2] Michigan prices where the influence of Huron's distributing methods has been strongest have consistently been lower than anywhere else in the country.[3]

Aetna ships packaged cement by boat to distributing points particularly Green Bay and Racine, Wisconsin. Shipping in bulk would be cheaper but Aetna has no bulk carrier.[4]

Aetna has found its boats to be very inefficient and has found boat delivery to be a poor way to transport cement. It has continued to transport packaged cement by boat, however, because it has not had the money to equip itself with a better method.[5] At one time Aetna had ten distributing points on the Great Lakes at Sault Ste. Marie, Menominee, Green Bay, Racine, Port Huron, Detroit, Toledo, Cleveland, Grand Haven, and Bay City, and two, Fenton and Saginaw, located at inland points.[6]

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[1] Crapo, Vice President, Huron (C) Tr. 11234-36, 11038-39. Resp. Exs. 47, 2392.

[2] Meyers, Traffic Manager, Huron (R) Tr. 33681. Crapo, *supra*, Tr. 11429, 12080. See also Part VI, pp. 1456-74, *supra*.

[3] Calvin, President, Aetna (R) Tr. 30056-57. Nelson, J. L., Vice President, Wolverine (R) Tr. 35906.

[4] Id., Tr. 30144-46.

[5] Id., Tr. 30148.

[6] Com. Ex. 17: Map showing distributing points of Aetna with particular reference to water and truck transportation possibilities.

At a meeting of manufacturers at the Book-Cadillac Hotel in Detroit on October 24, 1933 in connection with the preparation of the NRA Code Aetna told those present that it would continue to ship by water to Wisconsin, Grand Haven, Green Bay and Menominee.[7] A memorandum dated October 25, 1935, written by F. R. Johnson, President of Aetna, shows that Aetna would continue its practice of shipping packaged cement by boat to the various destinations, putting its cement in warehouses, and distributing it through its own selling force.[8]

In the spring of 1937 Aetna bid to the United States Engineers for delivery at White Fish Bay and Mackinac, Michigan. The government's proposal asked that cement be delivered by boat or barge to Mackinac in 600 barrel lots. It was not practical for Aetna to deliver by boat in such small amounts and the company so advised the government in a letter accompanying its bid, which stated that it could only consider delivery of the entire amount of 2,500 or 3,000 barrels at one time, otherwise boat delivery would be uneconomical. Aetna did not get the award for this job.[9]

Lehigh in its early years shipped a great deal of cement by water. It was still shipping some cement over the Lakes to Duluth as late as 1913 or 1914.[10]

From a Cleveland grinding plant, Lehigh distributes cement ground from clinker which has been shipped by

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[7] Com. Ex. 22 B: Memorandum of meeting at Book-Cadillac Hotel on October 24, 1933. Evidence as to this meeting is digested in Part VI, p. 1685 *et seq.*, *supra*.

[8] Com. Ex. 34: Inter-office memorandum dated October 25, 1935, F. R. Johnson, President, Aetna, to Cree, Sales Manager Aetna.

[9] Calvin, President, Aetna (R) Tr. 30123.

[10] Bowen, Vice President, Lehigh (R) Tr. 27171-72.

water from the Great Lakes plant at Buffalo.[11] But Great Lakes cement is not shipped by water into Michigan ports, although Huron ships from Michigan down into eastern lake ports where Great Lakes does business. Bowen testified that the situations are not at all comparable because Great Lakes gets its stone in Michigan and makes cement at Buffalo and cannot then ship to Michigan and compete with cement manufacturers there whose plants are at the quarries.[12]

Medusa transports in bulk a substantial amount of cement in boats operated by one of its subsidiary companies from Manitowoc to various distributing silos. In the few instances where Medusa has sold cement for water delivery directly to purchasers it has made delivery in small quantities of packaged cement. This has not resulted in any saving as against the cost of rail shipment.[13]

Medusa erected a silo and packing plant in Milwaukee and in Chicago in 1926 and has operated them continuously receiving bulk cement from the Manitowoc plant by boat. Delivery in Milwaukee is made by rail or by trucks, depending upon the demand of the trade. The Chicago packing plant was erected to obtain advantages of low rates of water transportation between Manitowoc and Chicago and in order to be in a position to give quick delivery by truck to meet a competitive situation arising out of truck deliveries to the Chicago market from the Universal Atlas mill at Buffington, Ind.[14]

Medusa rented a warehouse at Holland, Michigan and transported cement from the Manitowoc plant by a small

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[11] Bowen, Vice President, Lehigh (R) Tr. 26549, 26591.

[12] Id., Tr. 27171.

[13] Dawson, Vice President, Medusa (R) Tr. 40072-73.

[14] Id., Tr. 40033-35.

boat. This warehouse was opened about 1933 and served this territory until 1937, when the prices in Michigan became so low Medusa discontinued it. In 1939, Medusa erected a silo and packing plant at Holland. It transports cement in bulk to this silo by water from Manitowoc.[15]

The water rates are lower than the rail rates from Manitowoc to Chicago, but this is more than offset by the cost of operating a silo in Chicago.[16] Medusa's total cost would not be higher than it has been through its utilization of water transportation, if Medusa delivered from Manitowac to Chicago by rail. If Medusa shipped to Chicago by rail, it would not have a silo there.[17] The cost of operating a silo is a factor in bulk delivery but it is not a factor in a shipment by rail from Manitowoc to a customer in Chicago.[18]

Additional expenses are entailed on boat shipments from Manitowac to these markets as compared with shipments by rail. Medusa has the additional investment in silos, depreciation on buildings and equipment, overhead such as taxes and insurance, and it has to maintain a packing and loading crew whether business comes in or not.[19]

While rates for water movement alone are generally lower than rail rates, it depends on the operation of the boat how low the rates are. In some cases water transportation has been an advantage and in some cases it has been a disadvantage.[20]

[15] Dawson, Vice President, Medusa (R) Tr. 40038-39.

[16] Id., Tr. 40035-36.

[17] Id., Tr. 40504-05.

[18] Id., Tr. 40625-26.

[19] Id., Tr. 40155.

[20] Id., Tr. 40500-01.

Peerless, while it has shipped by water from its plant and has sold cement to the United States Government for improvements on the Great Lakes and in Northern Michigan for delivery by barge,[21] has had only one instance of water shipment in the last seven years. This shipment was in connection with some government work on a lighthouse structure near Sault Ste. Marie. Peerless furnished the cement, and a small steamer took it from the plant at Detroit to the site of the work. Peerless arranged for the transportation and paid for the steamer. This was three or four years ago, and the order was a small one involving about 2,000 or 3,000 barrels.[22]

Peerless has considered the desirability of water transportation and has decided against it.[23] The company made a careful study and analysis of the method of distributing cement around the Great Lakes by boat from Detroit to find out whether there is any advantage to be gained by this method.[24] This survey came about because in 1933, when Peerless was in receivership, it had to solve the problem of what to do with three pieces of marine equipment which had been purchased by the old company for the purpose of interplant distribution of finished cement around the Lakes.[25] More than $150,000 had been invested in this equipment, and it had been lying idle and costing money for insurance. For its study of the problem Peerless collected data on the population of the area, the marine equipment available on the Lakes, the marine equip-

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[21] Russell, Vice President, Peerless (R) Tr. 34400-01.

[22] Id., Tr. 34473-74.

[23] Id., Tr. 34699.

[24] Id., Tr. 34171.

[25] Com. Ex. 970-6 E-F: Answer of Peerless to Burns-Clark Questionnaire; Russell, *supra*, Tr. 34176.

ment that Peerless had, costs of insurance, the period of time that the material could be used effectively, cost of operations and investments.[26]

Peerless concluded that it should not ship cement from Detroit to other points around the Great Lakes because it could deliver the cement by rail to its customer at the point of use cheaper than it could do so by boats to a warehouse and then back to the customer. Peerless never has had an agreement with any of its competitors not to go into the business of shipping cement on the Lakes by water.[27]

Petoskey ships by company controlled boat to silos located in Chicago, Detroit, and Milwaukee. Some cement shipments are made from silo to customer by rail, but most of the shipments are trucked.[28] Petoskey owns and operates a mill located at Lamsen within three miles of Petoskey, Michigan, on the northeast shore of Lake Michigan. To each of the above silos it ships finished cement in bulk by water from this mill. The cement is packed after arrival at these silos and distributed.[29]

Construction of the three silos began in 1928 and was completed in 1929. Prior to 1928 Petoskey transported cement in packages by boat to Milwaukee, Detroit and other Lake ports. This method of transportation was very costly as compared with shipping cement in bulk, and Petoskey determined that it should effect a considerable saving by the construction of bulk plants and by shipping cement to these plants by water in bulk.[30]

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[26] Russell, Vice President, Peerless (R) Tr. 34176-78.

[27] Id., Tr. 34183.

[28] Lucas, Vice President, Petoskey (R) Tr. 38688.

[29] Id., Tr. 38737.

[30] Id., Tr. 38738-39.

Universal Atlas in recent years has been shipping by water from the Buffington plant to its distributing stations on the Great Lakes[31] by company controlled boats.[32] The water shipments which Universal Atlas makes from Buffington are in large quantities. Such shipments have been in packages, but at the present time are exclusively in bulk and exclusively to silos owned by Universal Atlas and not directly to customers. These stations are located in Milwaukee, Green Bay and Muskegon on the Great Lakes.[33]

3. Hudson River and New York Harbor

Alpha took over the Alsen mill in 1909.[1] The fact that water transportation from Alsen was available had some influence upon Alpha's acquisition of the mill.[2] At the time Alpha purchased the Alsen mill it had a contract with a very large dealer in New York City under which he bought the cement at the mill and provided his own water transportation.[3] While this contract lasted, Alpha shipped a large amount of cement by water from its Alsen plant.[4] But while the contract existed Alpha could not sell any other dealers in New York because they felt that this man had an advantage and, generally speaking, they would not give Alpha their business.[5] After the expiration of this

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[31] Stone, Vice President, Universal Atlas (R) Tr. 35126-27.

[32] Com. Ex. 975-14 H.: Answer of Universal Atlas to Burns & Clark Questionnaire.

[33] Stone, *supra*, Tr. 35131.

[1] Coogan, Vice President, Alpha (R) Tr. 23116.

[2] Id., Tr. 23119-21.

[3] Id., Tr. 23117.

[4] Id., Tr. 23745.

[5] Id., Tr. 23117.

contract, the proportion of cement shipped by water fell materially. In later years shipment in barge loads almost stopped because Alpha's customers would not purchase it in such large quantities. They wanted deliveries by railroad lighterage where they could get it in carloads, instead of the large boatloads which Alpha would have had to ship from Alsen.[6] Today, as far as dealers in New York are concerned, Alpha makes deliveries direct from railroad cars or floats or from cars in railroad yards.[7]

At one time there were a few customers on the Hudson River who had warehouses on the river and could take delivery by boat, but there are none at the present time.[8] An occasional boatload of cement is sent to one of Alpha's customers on the New York waterfront but that is very seldom. So far as Alpha is concerned water transportation is confined to Long Island points from Alsen.[9] For more than ten years New York dealers have been unwilling to take loads of 2,000 or 3,000 barrels delivered by water.[10] No customer wants 3,000 barrels.[11] Another decided change within the last six or eight years in the attitude of New York dealers toward buying cement delivered by water has been brought about by the railroads making prompt deliveries of one and two carloads from the Lehigh Valley. This has stopped the Hudson River mills from shipping down to New York in boatload lots.[12]

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[6] Coogan, Vice President, Alpha (R) Tr. 23745-46.

[7] Id., Tr. 23119-20.

[8] Id., Tr. 23813.

[9] Id., Tr. 23813, 23810.

[10] Id., Tr. 24546.

[11] Id., Tr. 24555.

[12] Id., Tr. 24547.

Alpha moves a fairly large tonnage of cement from its Alsen plant in a combination water and rail movement. The cement is taken by water from the mill, put alongside the railroad docks at Long Island City, reloaded into cars and shipped to points on Long Island.[13] Apart from this, Alpha has had no demand for shipments by water. At the present time about 20% of Alpha's shipments from the Alsen mill go to Long Island City.[14] The combination of the cost of water shipment to Long Island City and rail from there to the customer's destination is about the same as the cost of all rail transportation.[15]

Alpha has found that a comparison of water and rail prices for shipping to thirty-two Long Island destinations shows that in some instances water rates have exceeded all-rail rates and in other instances have been less than all-rail rates.[16]

For example, the water rate to Blissville, Long Island, was lower for Alpha than the rail rate to Blissville, but there was no market for cement in Blissville. Water rates to Blissville were only lower when a shipment of 3,000 barrels was involved, but no customer wanted 3,000 barrels. Alpha's cost of water delivery to Long Island City was as high as the rail cost. The cost of cement sent to Blissville by water for reshipment by rail in carload lots at least equalled the cost of the through rail rate.[17]

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[13] Coogan, Vice President, Alpha (R) Tr. 23743-44.

[14] Id. Tr. 24543-45.

[15] Id., Tr. 24547-48.

[16] Resp. Ex. 715 for Id.: Comparison of water and rail prices for shipping to 32 Long Island destinations dated November 1, 1938. Respondents have moved to adduce this exhibit. See Motion to Adduce Additional Evidence, Subject VIII, Pars. 49-50.

[17] Coogan, *supra*, Tr. 24554-55.

As far as Alpha's experience has been concerned, water transportation has been as costly, or more so, than rail transportation in the same sized lots.[18]

The Interstate Commerce Commission has found that water transportation in connection with rail transportation involves a lower rate than all rail transportation between the same points, if, and only if, the distance via the combined rail and water routes is not materially greater than that of the the all rail route, and if, and only if, the cost of transfer is not out of proportion.[19]

Lehigh has shipped cement on company-controlled boats in New York harbor and in the adjacent territory.[20] The company made water shipments from its Alsen mill during part of 1926, most of 1927 and for a short period in 1928. Lehigh has shut down this mill and has shipped no cement from it since 1928.[21] Keystone, with its mill at Bath, Pa., has found that a private lighter is more expensive than a railroad lighter. When the railroad lighter is used the rate from Bath to New York includes the lighterage charge. Keystone has known of no cheaper method of transportation than transportation by rail.[22]

North American, in July 1935, established a stock of cement on a barge at a dock in Brooklyn, N. Y. for delivery to trucks at a price 33¢ lower than the former price, in an attempt to make the market less attractive to foreign

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[18] Coogan, Vice President, Alpha (R) Tr. 24998-99.

[19] Simpson, Rate Clerk, I.C.C. (C) Tr. 48456-58.

[20] Com. Exs. 968-1 B, 3 K; 969-14 J, 16 U, 17 L: Answers of Lehigh to the Burns-Clark Questionnaire.

[21] Bowen, Vice President, Lehigh (R) Tr. 27251-52.

[22] Scott, President, Keystone (R) Tr. 27379-80.

competitors.[23] Many companies with mills in the Lehigh Valley likewise established stocks at the docks in Brooklyn, N. Y.[24] One of these companies, Alpha, secured the use of a dock in Brooklyn, N. Y., arranging with the railroads for car deliveries in the railroad yards. Alpha met North American's competition by making deliveries to trucks from boats at the dock or from cars as the customer might desire. If Alpha had not met this competition it would have been completely out of that market, and in addition it would have lost prestige which had been built up with customers over a number of years.[25] North American discontinued this stock of cement at Brooklyn, N. Y. in December 1935. The main reason for doing this was because it was approaching the season when the Hudson River would freeze, and the company could no longer make water shipments to Brooklyn. North American had been watching the monthly figures for imports very closely and had noticed that during the latter months of the year imports had fallen off considerably. North American got some encouragement from this and felt that in view of the increasing cost of transportation from its mill at Catskill to Brooklyn, it was justified in taking out those stocks.[26]

Penn-Dixie has shipped cement on barges operated by it in New York harbor.[27]

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[23] Porter, President, North American (R) Tr. 33851-52. Com. Ex. 1099 R, W: Bids to Navy at Brooklyn, N. Y.

[24] Part XVI, C 3, *infra*.

[25] Coogan, Vice President, Alpha (R) Tr. 23746-47.

[26] Porter, *supra*, Tr. 33859-60.

[27] Com. Ex. 968-5 M, 6 D, 6 V; Com. Ex. 975-8 F, 9 M-N and Com. Ex. 976-3 U-V: Answers of Penn-Dixie to Burns-Clark Questionnaire.

Universal Atlas has made some water shipments, but, except from one plant, the shipments have been comparatively infrequent. The company has shipped by water regularly from its Hudson mill primarily to New York City.[28] From ten to fifteen per cent of its total shipments from this mill are by water or are by water and rail.[29]

Universal Atlas does not ship as little as 300 barrels of cement by water. It does not make any appreciable number of water shipments of quantities less than 1,000 barrels. The company prefers to ship larger quantities than this because the rate per barrel is somewhat less.[30] It makes water shipments to dealers who are so located that they can handle the cement conveniently.[31]

Sometimes water rates have been lower than rail rates, but sometimes they have been higher. The prime reason for Universal Atlas' shipping by water from its Hudson mill is because water rates are lower than rail rates.[32]

Where a mill is not equipped to make shipments regularly by water, it is a nuisance to deliver and handle such shipments. Where a mill is so equipped, usually it has been expensive to equip it in that way, and, when everything has been taken into consideration, the mere fact that the company has been able to hire a water movement for less money than it has hired a rail movement from the same place is not the entire story as to the expense of getting the cement delivered by water.[33]

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[28] Stone, Vice President, Universal Atlas (R) Tr. 35126-27.

[29] Id., Tr. 35251-52.

[30] Id., Tr. 35253.

[31] Id., Tr. 35253.

[32] Id., Tr. 35127-28.

[33] Id., Tr. 35129-30.

4. Mississippi River

Alpha has made one or two shipments from its St. Louis mill to the rail head at St. Louis by rail and transferred it to a boat for points on the Mississippi River. There the combination cost has been greater than the all rail cost. Alpha has made one shipment from its La Salle, Illinois mill to Peru, Indiana and loaded it on boats, but again the combination cost has been greater than the all rail cost. When such shipments have been made, Alpha has hired the barges.[1]

Dewey located its mill at Davenport, Iowa, because of the advantage of river transportation for coal, gypsum and other commodities in addition to cement.[2] Nevertheless the desire of the customer has determined whether shipments from the Davenport plant were made by barge or by rail. The company, irrespective of destination, has never failed to comply with the request of any customer for barge delivery.[3] There has never been a dealer who has been able to take delivery of his cement at his warehouse by barge.[4] Dealers cannot haul cement from the dock to a job, although they can haul from a railroad siding because the unloading charges that the dealer must pay at the dock are higher than the switching charges that must be paid at a railroad siding.[5] Dewey has never made any agreement with any competitor in regard to the form or method of shipment that the company would use in distributing its cement.[6]

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[1] Coogan, Vice President, Alpha (R) Tr. 23814-15.

[2] Moore, R. W., Vice President, Dewey (R) Tr. 47310.

[3] Id., Tr. 46668.

[4] Id., Tr. 47437.

[5] Id., Tr. 47456-57.

[6] Id., Tr. 46681-82.

The majority of Dewey's water shipments have been made to points on the Mississippi River between Minneapolis, Minnesota, and Alton, Illinois, where the government has had locks and dams under construction. Some water shipments have also been made to points where road paving projects have been under way, and one shipment has gone to a point where the City of Quincy, Illinois, was doing sewer work. None of this cement went to any private purchaser or dealer.[7]

Dewey has given consideration to the establishment of silos at Minneapolis and St. Paul. Such an adventure would require an expenditure of about $375,000, which the company has not cared to make because business in sight has not justified it. Furthermore Dewey has found that it could only operate on the river for about six months each year because of ice conditions.[8] Dewey has considered building barges of its own, but has not done so because the cost would be more than $20,000 apiece. Moreover, because they have to be specially constructed for carrying cement, Dewey would not be able to find any other use for them.[9] The costs of this type of water transportation are as great as, or greater than, the cost of shipment by rail.[10]

Dewey made an investigation to determine whether its Davenport mill could effect any saving in shipments made to customers by means of a public barge as compared with shipments by rail. The company found that the expense of delivery by barge at the published rates of public water carriers is such that the cost is as great as, or greater than the cost of shipment by rail.[11]

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[7] Moore, R. W., Vice President, Dewey (R) Tr. 46676-77.

[8] Id., Tr. 47437-38.

[9] Id., Tr. 47441.

[10] Id., Tr. 46673-75. O.P.

[11] Id., Tr. 46673. O.P.

Missouri made no shipments by water from its plants prior to 1934. Although there was no customer demand at either plant, Missouri observed that some of its competitors were obtaining business by offering facilities for barge delivery. As a result in 1934 Missouri constructed six 2,500 barrel barges to use in shipping cement produced at Prospect Hill.[12]

Missouri has never refused to ship by water to any customer desiring it and has shipped in less than full barge load quantities to customers requesting it. Missouri has never had any agreement with competitors regarding its form or method of transportation.

Missouri's Prospect Hill plant is so situated that cement must be transported several miles by rail to a transfer station on the Mississippi River. Since 1934 Missouri has shipped cement partially by water on a few specific jobs.[13]

Universal Atlas has made shipments from time to time from its Hannibal Plant.[14] Occasionally water shipments from the Hannibal Mill have been in sizeable quantities in excess of 1,000 barrels.[15]

5. Ohio River

Alpha has made shipments by water from Ironton by taking cement from the mill to the waterfront and loading it on barges for points on the Ohio River, but the trans-

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[12] Alexander, President, Missouri (R) Tr. 37131-32.

[13] Id., Tr. 37133.

[14] Stone, Vice President, Universal Atlas (R) Tr. 35126-27.

[15] Id., Tr. 35254.

portation cost involved in that movement has been greater than rail transportation.[1]

Dewey purchased cement from Missouri during the year 1935.[2] The purchase was made from Missouri in order to supply a quantity of cement that one of Dewey's best customers needed for a road paving project at Cave-In Rock, Illinois, a point on the Ohio River requiring barge delivery. This point was outside of Dewey's normal trade territory, but it sold the cement to its customer and purchased a sufficient quantity from Missouri to supply its commitments under the contract.[3] The customer in this instance, one of Dewey's best, desired shipments by barge, and Dewey was unable to make such shipment as it had no barge shipment facilities at its Dewey, Okla. plant, and its Davenport plant was too far distant from the point involved. If Dewey had been able to ship by barge, it would not have purchased this cement from Missouri.[4]

Green Bag, W. Va. has shipped cement in barges. At one time it shipped to Cincinnati, Ohio, and to Charleston, West Virginia. It once owned nine barges. The company sold five and one sank. It has three left which it would be glad to sell.[5]

Prior to 1931 Green Bag, W. Va. delivered from 40,000 to 50,000 barrels by barge a year. In 1931 they ceased deliveries by barge because the cost of maintaining a wharf boat, attendants and bookkeeping offset the rail rate. Neither the Institute nor any member of the Institute contacted Green Bag, W. Va. in connection with the use of

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[1] Coogan, Vice President, Alpha (R) Tr. 23814.

[2] Moore, R. W., Vice President, Dewey (R) Tr. 46904-05.

[3] Id., Tr. 46905-06.

[4] Id., Tr. 46906-07.

[5] Wood, General Manager, Green Bag, W. Va. (R) Tr. 29526-27.

barges. No cement moves down the river by barge today.[6] The receiver determines whether Green Bag, W. Va. will ship by water or not.[7] Dealers are not equipped to handle barge shipments. A barge holds about fifteen carloads of cement and requires a lot of cash. On the other hand it is only necessary to lay out money on one car on rail delivery in order to put cement alongside a dealer's warehouse.[8] Green Bag, W. Va. does not ship less than a barge load by water because the transportation people, who have the boats to tow the barges, charge as much for half a barge as for a full barge.[9]

Kosmos has operated its own boats and has employed water transportation on the Ohio River for about 15 years. The Company ships from 15% to 20% of its cement by water, and its regular destinations are Cincinnati and Evansville. Kosmos has no demand to ship by barges from purchasers located in Louisville, because Louisville is too close for barge delivery to be practical.[10]

Pittsburgh occasionally ships cement by barge. It ships by rail from its plant to Pomeroy on the Ohio River, where it leases a small dock. Cement is taken from cars there and put in boats and carried to destination.[11]

Superior has shipped down the river by barge when it has had an opportunity. If the customer has asked to take delivery by barge, Superior has shipped that way.[12]

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[6] Wood, General Manager, Green Bag, W. Va. (R) Tr. 29888-90.

[7] Id., Tr. 29526-27.

[8] Id., Tr. 29887-88.

[9] Id., Tr. 29528.

[10] Horner, President, Kosmos (R) Tr. 36959-61.

[11] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37883.

[12] Davis, President, Superior (R) Tr. 29604.

Universal Atlas has made shipments by water from time to time from its Universal, (Pittsburgh) Pa. plant.[13]

West Penn has had occasion to make shipments by water, but it has been a very infrequent method of shipment and has been used only when the cement has been sold to be used on dams or river piers on the Allegheny and Ohio Rivers. These shipments go partly by rail.[14]

6. Tennessee River

Penn-Dixie has shipped by water from its Richard City, Tennessee plant.[1] In furnishing cement on the Pickwick and Wheeler projects Penn-Dixie, pursuant to the request of the Tennessee Valley Authority, delivered cement in its own barges.[2] These barges were hired, and the T.V.A. did not haul a barrel of the cement supplied by Penn-Dixie.[3]

A combined water and rail or water and truck movement was necessary to make delivery to Wheeler Dam, because the nearest rail point to the Dam was about five miles away. Cement had to be taken up by water or trucked over from the town of Town Creek.[4] The only way in which water delivery could be made at Guntersville for T.V.A. was to take the shipment first by rail to Guntersville, unloading from cars to barges on the river and floating the cement out to the Dam, which was about two miles from the rail delivery point.[5]

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[13] Stone, Vice President, Universal Atlas (R) Tr. 35126-27.

[14] McKee, Vice President, West Penn (R) Tr. 27810.

[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38463-64.

[2] Id., Tr. 38386-87.

[3] Id., Tr. 38383-84.

[4] Id.

[5] Id., Tr 38518-19.

C. Pricing Policies.

1. Introduction

As already shown above a considerable amount of cement is shipped by water from cement mills to storage and distributing silos where it is in turn delivered by rail or truck to customers. In every case the company so shipping has established a price base at the silo distributing point either for delivery to trucks at the silo or for rail delivery or for both. In every instance also the silo base has been lower than the price formerly prevailing at that point. Thus Lone Star at its Washington silo established a price based upon its Norfolk, Virginia mill base plus the cost of barge delivery from Norfolk to Washington. Similarly in the Great Lakes area where barge and boat delivery to silo distributing points around the Lakes has been common, prices in the areas have been lower than at other points in the United States where such water delivery is not available.

Where the United States Government has invited bids for water delivery respondents have quoted prices f.o.b. mill or rail head, or, f.o.b. barges where the mill is located on navigable water.

In a letter dated April 11, 1935 from Reiter, Chairman of the Code Authority to Dr. Arthur R. Burns dealing with prices for water delivery filed with the Code Authority during the NRA period, Reiter stated:

> "We have filed with us a number of prices in the United States f.o.b. barge or unloaded on dock at various destinations upon inland waterways and at coastal points. In general I would say that such prices f.o.b. barge reflect the carload price at such destinations, but in other cases they do not do so. * * * We have filed with us to the best of my knowledge only three prices f.o.b. barge at mill

points, all other barge prices being f.o.b. destination. You understand, of course, that the open price provisions of our Code apply to possessions of the United States and all such prices naturally reflect the cost of water transportation."[1]

The evidence below shows the policies followed by individual mills in different "water areas." Companies or mills as to which there is no evidence are omitted.

2. Atlantic Ports

On one occasion in 1935, in order to meet special low prices in Miami established to compete with foreign cement, some companies in the Lehigh Valley shipped by rail to Philadelphia then to Miami via the Merchants & Miners Transportation Company and charged the rail delivered price in Philadelphia plus the water rate from Philadelphia to Miami. These movements stopped when the Seaboard Airline Railway which served the southern mills of these companies met competitive transportation costs and gave quicker delivery.[1]

On the few water shipments which Lone Star has made to the State of North Carolina the company has charged either the rail delivered price, the water delivered price, or sold f.o.b. mill Norfolk.[2]

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[1] Com. Ex. 277 K-M: Letter of G. H. Reiter to Arthur R. Burns dated April 11, 1935.

[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38254-56.
Com. Ex. 514 C-F: Memorandum dated September 28, 1935 in support of 4th section application—proposed reduced rates from Southern cement producing points to Miami, Florida.
Com. Ex. 516 A-D: Memorandum of D. S. Browder dated September 28, 1935 of information in connection with 4th section application.

[2] Neylan, General Sales Manager, Lone Star (C) Tr. 6108, 6123-

3. Hudson River and New York Harbor

At the time of Alpha's acquisition of its Catskill mill at Cementon, New York the company sold f.o.b. mill with purchaser providing his own water transportation. Inability of all purchasers to provide their own water delivery, absence of any stable rate for water delivery resulting in different prices to purchasers, lack of demand for the large quantities attendant to water delivery, and quicker rail delivery forced the abandonment of this policy.[1] When water rates were more or less stabilized, Alpha thereafter used water rates in arriving at its destination prices in New York City. On sales to those purchasers who would take water delivery, Alpha used the water rate from Hudson to New York if it made a lower price. The rail rate to New York now used by Alpha makes a lower price in New York than Alpha's base in the Hudson Valley plus the water rate to New York City.[2] There has been no instance in Alpha's experience wherein the use of water transportation instead of rail netted Alpha more than its base price.[3]

If Alpha had a sizable order to ship to New Haven on which water delivery was requested, Alpha would quote the customer the rail price at that point, since in New Haven Alpha has several different customers—some of whom would not take water delivery—and Alpha could not make different delivered prices to different New Haven customers.[4]

In the summer of 1935 when Alpha made arrangements for water delivery from its Alsen mill to dealers' trucks in

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[1] Coogan, Vice President, Alpha (R) Tr. 23117-22, 23745-56.

[2] Id., Tr. 24563-64.

[3] Id., Tr. 24780.

[4] Id., Tr. 23811-13.

Brooklyn in order to meet[5] the competition of North American. Alpha hired these boats at so much per barrel,[6] and there were two rates stated in Alpha's agreement with the boatmen. One rate covered the transportation of the cement to Long Island City and the other rate covered the transportation of the cement from the boats at Long Island City to trucks or to cars.[7] In the case of transportation to cars there was a further freight charge.[8] In these cases Alpha quoted a delivered price equivalent to its base price plus the cost of water freight charges to destination.[9]

Universal Atlas has shipped from its mill at Hudson, New York at an f.o.b. destination price which generally has been made up in the same manner as the price made up on rail shipments. If Universal Atlas reduced its delivered price on water shipments, rail shippers to the same point would reduce their prices, and this would simply start a downward spiral.[10]

4. Mississippi River

On numerous occasions the United States Engineers have requested bids f.o.b. mill for delivery by government barges for work along the Mississippi River. Substantially all respondents who, by reason of their location on or near navigable water, were in a position to respond to such bids, did so, bidding either f.o.b. mill cars or barges and f.o.b. railhead. These companies included: Alpha, Arkansas, Cumberland, Dewey, Hermitage, Kosmos, Lehigh, Lone

[5] Coogan, Vice President, Alpha (R) Tr. 23746-47.

[6] Id., Tr. 23744.

[7] Id., Tr. 23749, 23759.

[8] Id., Tr. 23759.

[9] Id., Tr. 23749, 23759.

[10] Stone, Vice President, Universal Atlas (R) Tr. 35128-29.

Star, Marquette, Missouri, National, Penn-Dixie, Signal Mountain and Universal Atlas.[1]

Other evidence as to water delivery in this area follows:

When Dewey has made shipments by water from Davenport, Iowa, it has always quoted the destination price and allowed the full rail freight from Davenport to destination. The company has never had any standard basis for the cost of water transportation. On water delivery, when it has been made, differences, if any, existing between the cost of rail transportation and the cost of water transportation have always been made fully and freely available to the customers.[2]

Hermitage, on water shipments from Nashville, Tenn. has charged a destination price unrelated to base price and rail charges.[3]

On water deliveries from Kosmosdale, Ky. Kosmos has charged rail delivered prices, but it is debatable as to whether Kosmos has ever secured more than its base price on such shipments. Ordinarily rail transportation makes the lowest price at any destination, and that is the price which Kosmos seeks to meet. The company makes no special allowance because of water transportation.[4]

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[1] Com. Exs. 771, 777, 780, 783, 785, 786, 793, 794, 795, 796.
Rice, Attorney, U. S. War Dept. (C) Tr. 3515, 3517-18, 3522-23, 3526-28, 3530, 3533, 3535, 3540-44.

[2] Moore, R. W., Vice President, Dewey (R) Tr. 46668-79.

[3] McGovern, Sales Manager, Hermitage (R) Tr. 36345.

[4] Horner, President, Kosmos (R) Tr. 37019.
Com. Ex. 972-1 M: Answer of Kosmos to Burns-Clark Questionnaire.

5. Ohio River

The material below shows that Green Bag, West Virginia is the only company selling in this area, which has sold cement delivered by water at a price equivalent to its base price plus the cost of rail freight to destination. The company has ceased water delivery because the cost of maintaining a wharf, boats, attendants and bookkeeping have offset the railroad rate.[1]

GREEN BAG, W. VA.: On barge shipments from Kenova, W. Va., Green Bag charged railroad delivered prices for a time prior to 1931.[2]

MEDUSA: On water shipments Medusa has made a special price to the Government for 80,000 barrels of cement for delivery at Conway via the Ohio River.[3]

SUPERIOR: Superior on occasions has received slightly more than its base price on combined water and rail shipments. This advantage could not be passed on to the consumer because competitors, who use the regular rail plus truck haul to the same place, would immediately cut their prices. As a result barge delivery is at the same price as rail delivery.[4]

6. Tennessee River

The only company selling in this area as to which there is any evidence is Penn-Dixie. Penn-Dixie has never sold its cement delivered by water at a destination price made up of its base price plus the cost of railway freight to des-

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[1] Wood, General Manager, Green Bag W. Va. (R) Tr. 29889-90.

[2] Id., Tr. 29888-90.

[3] Cole, Traffic Manager, Medusa (R) Tr. 41446-47.

[4] Com. Ex. 971-12 K-M: Answer of Superior to Burns-Clark Questionnaire.

tination. Penn-Dixie's pricing policies from its shipping points of Richard City and Kingsport, Tennessee have been as follows:

In bidding for water delivery to TVA for the Pickwick Dam near Sheffield, Alabama in September 1934 Penn-Dixie quoted its price on land grant rail rates where available up to the rail head on the river and barge rates quoted by the Cumberland River Sand Company from the rail head to the dam site. The barge rates of the Cumberland River Sand Company were the lowest barge rates Penn-Dixie had been able to secure.[1]

Penn-Dixie's price based on Dr. Morgan's formula for delivery to the Aurora dam site near Danville, Tennessee would have made a higher price for delivery to Aurora than for delivery to Pickwick. Penn-Dixie knew, however, that Marquette had been making deliveries in its own barges beyond Aurora at the Pickwick price. Penn-Dixie felt that it would not be proper to charge TVA a higher price at Aurora than the price at Pickwick and also desired to meet the competition of Marquette. As a result Penn-Dixie arbitrarily reduced its Aurora price making a special price equivalent to the Pickwick price.[2]

7. Effect of Water Delivery on Mill Nets

The use of water delivery has often resulted in a per barrel yield to the company lower than the company's base (if it had one) or lower than the company's maximum mill net (where it had no base). Occasionally the use of water delivery has resulted in a per barrel yield greater than the company's maximum mill net or base if delivery had been made by rail. The only specific evidence on this subject is shown in the following table compiled from answers to the Burns-Clark Questionnaire:

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[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38379-81.

[2] Id., Tr. 38381.

Total number of barrels moved partly or wholly by water during the selected months of June, 1925, January, 1928, June, 1932, and January, 1933, in which the yield per barrel was greater or less than it would have been if the sales had been made at base prices

Company	Barrels yielding less than the base price (or, in the case of a non-base mill, less than the price per barrel at the railroad station at the location of the mill)	Barrels yielding more than the base price (or, in the case of a non-base mill, more than the price per barrel at the railroad station at the location of the mill)	Com. Ex.
Alpha (Martins Creek)	86,637		973-2 J
Alpha (Cementon)	71,350		973-2 M
Coplay	58,692		973-3 A
Dewey (Davenport)	1,288	16,969	972-2 Q
Edison	8,050		973-2 Y
Giant	13,487¾		973-3 E
Hercules	1,100		973-3 C
Hermitage	1,500		972-2 F
Kosmos	20,475½		972-1 M
Lawrence (Northampton)	14,611		973-2 T
Lawrence (Thomaston)	15		973-2 W
Lehigh (Fogelsville)	43,328		973-1 O
Lehigh (Ormrod A)	87,233		973-1 Q
Lehigh (Ormrod B)	30,776		973-1 R
Lehigh (West Coplay)	20,813		973-1 S

Total number of barrels moved partly or wholly by water during the selected months of June, 1925, January, 1928, June, 1932, and January, 1933, in which the yield per barrel was greater or less than it would have been if the sales had been made at base prices

Company	Barrels yielding less than the base price (or, in the case of a non-base mill, less than the price per barrel at the railroad station at the location of the mill)	Barrels yielding more than the base price (or, in the case of a non-base mill, more than the price per barrel at the railroad station at the location of the mill)	Com. Ex.
Lehigh (Bath)	67,887		973-1 T
Lehigh (Sandt's Eddy)	44,527		973-1 V
Lehigh (Alsen)	5,505		973-2 A
Lone Star (Hudson)	75,379	1,045	973-2 O
Lone Star (Norfolk)	2,691	390	972-1 O
Medusa (Bay Bridge)	2,243½		973-3 R
Medusa[1] (Manitowoc)	27,935¾		972-1 E
Nazareth	16,857		973-2 N
North American (Catskill)	49,972		973-2 S
Penn-Dixie (Nazareth)	12,375		973-2 E

[1] On lake transportation to points on the Eastern Shore of Lake Michigan Medusa's shipments have yielded higher nets than average.

Com. Ex. 970-5 K: Answer of Superior to Burns-Clark Questionnaire.

Total number of barrels moved partly or wholly by water during the selected months of June, 1925, January, 1928, June, 1932, and January, 1933, in which the yield per barrel was greater or less than it would have been if the sales had been made at base prices

Company	Barrels yielding less than the base price (or, in the case of a non-base mill, less than the price per barrel at the railroad station at the location of the mill)	Barrels yielding more than the base price (or, in the case of a non-base mill, more than the price per barrel at the railroad station at the location of the mill)	Com. Ex.
Penn-Dixie (Bath)	97,233		973-2 G
Penn-Dixie (Richard City)	898		972 U
Petoskey	36,003½		973-4 H
Superior Corp.	17,846¼		973-4 D
Universal Atlas (Northampton)	39,103		973-2 B
Universal Atlas (Hudson)	33,318	7,500	973-2 C
Universal Atlas (Universal)	25,276		973-3 Q
Vulcanite	36,813		973-2 X
West Penn	12,554		973-4 A

STATEMENT OF CEMENT TRAFFIC HANDLED ON THE VARIOUS WATERWAYS OF THE UNITED STATES, YEARS 1919 TO 1935, INCLUSIVE, AS APPEARING IN ANNUAL REPORTS OF THE CHIEF OF ENGINEERS, UNITED STATES ARMY AND FROM PORT RECORDS

WATER BORNE TONS CEMENT TRAFFIC ON CENTRAL LAKES

	Year	1919	1923	1927	1931	1935
RECEIPTS AT PORTS						
1 Chicago Harbor (River & Lake)	Ill.	—	—	41957	45190	44300
2 Detroit	Mich.	—	115934	324290	44018	116882
3 Gladstone Harbor	"	—	—	—	—	8688
4 Menominee Harbor & River	"	578	2816	675	—	6162
5 Saginaw River	"	—	—	—	—	33077
6 Rouge River	"	—	—	—	—	—
7 Duluth	Minn.	55633	33653	85829	114728	57068
8 Buffalo	N. Y.	—	2050	—	37890	19614
9 Oswego	"	—	—	—	—	7600
10 Cleveland (Cement)	Ohio	16820	17530	71000	31930	13204
11 Cleveland (Clinker)	Ohio	—	—	—	62048	5400
12 Toledo	"	—	—	—	41980	17821
13 Green Bay	Wis.	—	1864	1458	—	17677
14 Milwaukee	"	29165	55766	119394	155149	84753
15 Racine	"	—	—	—	—	2225
16 TOTAL		102196	229583	644603	532933	428309
SHIPMENTS FROM PORTS						
17 Buffington	Ind.	—	—	—	38020	34093
18 Alpena	Mich.	149140	176985	A558117	A403843	A253050
19 Petoskey	"	—	C 39790	C 57803	C 89260	C 82018
20 Rouge River	"	—	—	—	—	5881
21 Saginaw River	"	—	—	15233	62019	25748
22 Menominee Harbor & River	"	2200	—	—	—	374
23 Buffalo (Cement)	N. Y.	—	—	—	954	—
24 Buffalo (Clinker)	"	—	—	—	62048	5400
25 Manitowoc	Wis.	—	—	66672	41014	28521
26 TOTAL		151340	216775	697825	97158	435085

WATER BORNE TONS. CEMENT TRAFFIC ON MISSISSIPPI RIVER

Year	1919	1923	1927	1931	1935
Between Minneapolis, Minn. and Mouth of Ohio River					
Upbound	B,663	334	324	35884	39670
Downbound	—	1479	3742	131484	130998
Between Cairo, Ill. and Memphis, Tenn.					
Upbound	—	—	3	10348	
Downbound		2467	7991	153888	
Between Memphis, Tenn. and Vicksburg, Miss.					
Upbound	—	3000	1576	129	90
Downbound		454	1347	13930	57477
Between Vicksburg, Miss. and New Orleans, La.					
Upbound	—	1347	775	180	
Downbound		2357	290	1395	

WATER BORNE TONS CEMENT TRAFFIC ON OHIO RIVER

Year	1919	1923	1927	1931	1935
OHIO RIVER					
CINCINNATI DISTRICT					
Inbound	—	—	4350	12483	21489
Outbound	—	—	2361	45946	20627
Upbound	212	1678	35923	48386	17630
Downbound	5668	2281	5906	45530	63287
PITTSBURGH DISTRICT					
OHIO RIVER ABOVE MILE 109 (Between Captina Island and Powhatan Point)					
ALLEGHENY RIVER MONONGAHELA RIVER					
Upbound)	B 8852	8623	18565	29736	5289
Downbound)		4133	35542	18732	47416

WATER BORNE TONS CEMENT TRAFFIC ON HUDSON RIVER

UPPER AND MIDDLE SECTIONS (TARRYTOWN TO WATERFORD)					
RECEIPTS					
Upbound)	F 5800	363	819	920	—
Downbound)		7951	—	14743	—
SHIPMENTS					
Coastwise) Internal)	—	G 298897	G 374567	G 247004	G 137245
Local Traffic	—	17014	—	—	830

EXPLANATION OF REFERENCE MARKS

A — Reported as "Limestone Products".

B — Direction of traffic not shown.

C — From private harbor of Petoskey Cement Company, about three miles west of Petoskey, proper.

F — The figures for Hudson River, Tarrytown to Waterford, inclusive, are not shown for 1919 and 1920 in the same form as in later years. The figures shown as receipts are merely the totals of receipts reported for various upper Hudson River ports.

G — Reports do not distinguish between Internal and Coastwise shipments, nor show direction of movement.

JHM/ER

PART VIII

DIVERSION OF CEMENT IN TRANSIT

A. Introduction.

The evidence digested below deals chiefly with the two types of diversion in transit shown in the two examples that follow. Diversion has also occurred when cement is sold under specific job contracts on condition that it will be used only on the specific job named in the contract and is then diverted from the named job. Evidence as to that form of diversion is digested in Part XI B, *infra*, page 1878 *et seq.*

[1. Example

Diversion whereby a dealer invades another dealer's territory and in diverting does not gain any price advantage over the other dealer. This occurs when, for example, the delivered price of mill X at destinations A and B is made up of a constant base at mill X plus freight (differing in amount) to A and to B.

Delivered price of mill X to dealer at A (Freight X to A 30¢)	$1.30
Dealer at A pays as follows:	
a. to mill X (mill net of X)	1.00
b. to railroad: freight from X to A	.30
	1.30
Delivered price of mill X to dealer at B (Freight X to B 40¢)	1.40
Dealer at B pays as follows:	
a. to mill X (mill net of X)	1.00
b. to railroad: freight from X to B	.40
	1.40

If dealer at B diverts cement in transit to him at B to the new destination at A this is what happens:

a. Dealer at B pays to mill X (as above)	$1.00
b. and to railroad: freight to A (30¢ as above) instead of to B (40¢ as above)	.30
	$1.30

a. Results

(1) Mill X gets the same mill net ($1.00) whichever destination the cement finally goes to. This is because its mill net on shipments to A and B is the same.

(2) the dealer at B gets cement at A at the same price as the dealer at A. This is because the difference in delivered price between A and B is the difference in the freight rates from X to A and to B (the difference between 30¢ and 40¢ freight).

(3) the dealer at A whose territory has been invaded by B is hurt by this and this has been accomplished by B without the knowledge of X and this disturbs X's relations with A. A looks to X for protection from this sort of thing. A has no way of protecting himself.

2. Example

Diversion whereby a dealer invades another dealer's territory and in diverting gains a price advantage over the other dealer. This occurs when, for example, the delivered price of mill X at destinations A and B gives to X different mills net and the freight rates from X to A and to B are also different.

Delivered price of mill X to dealer at A (Freight X to A 30¢)	$1.30
Dealer at A pays as follows:	
a. to mill X (mill net of X)	1.00
b. to railroad: freight from X to A	.30
	1.30

Delivered price of mill X to dealer at B (Freight X to B 50¢)	1.40
Dealer at B pays as follows:	
a. to mill X (mill net of X)	.90
b. to railroad: freight from X to B	.50
	1.40

If dealer at B diverts cement in transit to him at B to the new destination at A this is what happens:

a. Dealer at B pays to mill X (as above)	$ .90
b. and to railroad: freight to A (30¢ as above) instead of to B (50¢ as above)	.30
	$1.20

a. Results

(1) Dealer at B gets cement at A at cost of $1.20 whereas dealer at A gets cement at A at cost of $1.30.

(2) Mill X secures mill net of 90¢ while on undiverted sales to dealer at A, X nets $1.00.

(3) Dealer B has a price advantage of 10¢ over the regular dealer at A. The dealer market at A may be upset. This has been accomplished by B without the knowledge of X and this disturbs X's relations with A. A looks to X for protection from this sort of thing. A has no way of protecting himself and his complaint is more serious than in Example 1.]

B. Objections to Diversions by Manufacturers.

There is evidence that some thirty respondents and the non-respondent, South Dakota, object to diversions of cement in transit, of whom at least thirteen have maintained an express policy against diversions in transit commencing

many years prior to the formation of The Cement Institute.[1]

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[1] Aetna: Calvin, President (R) Tr. 30035.
Alpha: Coogan, Vice President (R) Tr. 23301 (since 1910), 24621-22.
Ash Grove: Sunderland, President (C) Tr. 13627-28, 13731-34, 13747.
Coplay: Twamley, Vice President (C) Tr. 6805.
Com. Ex. 295 D: Memo dated 9/10/35, Twamley, Vice President, Coplay to Larned.
Colorado: Com. Ex. 2460: Letter dated 9/1/36, A. T. Flint, Mt. States Lbr. Dealers Assn. to Warner, Colorado.
Com. Ex. 2470: Letter, 9/10/36, Warner, Colorado to Flint, Mt. States Lbr. Dlrs. Assn.
Dewey: Moore, R. W., Vice President (R) Tr. 46634-35 (at least 28 years), 47043.
Resp. Ex. 3627: Dewey quotation forms.
Federal: Bates, J. E., Sales Manager (R) Tr. 30626-28 (always).
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29539.
Hawkeye: Manley, General Manager (R) Tr. 41625-26 (at least 23 years).
Hermitage: McGovern, Sales Manager (R) Tr. 36237, 36097 (since 1924).
Huron: Meyers, Traffic Manager (R) Tr. 33575.
Resp. Ex. 2697: Uniform straight bill of lading, dated 10/2/35.
Kosmos: Horner, President (R) Tr. 36953.
Lawrence: Depends on conditions—sometimes permitted, sometimes refused. Ackerman, Sales Manager (C) Tr. 7340-41.
Lehigh: Bowen, Vice President (R) Tr. 26798-800, 27248.
Lone Star: Koch, Vice President (R) Tr. 32774-75 (always).
Com. Ex. 1112: "Trade Ethics and Marketing Policies"—issued by Lone Star in 1929.
Com. Ex. 1113: Letter from Pres. of Lone Star to Horner, Gov. of Illinois, dated 4/28/33.
Marquette: Colburn, Vice President (R) Tr. 40007-09 (always).
Medusa: Dawson, Vice President (R) Tr. 40057 (always); Cole, Traffic Manager (R) Tr. 41098-101.
Missouri: Alexander, President (R) Tr. 37133-34 (always).
Monarch: Brooke, Vice President (R) Tr. 42312-13.
National: Dannelly, Vice President (R) Tr. 39579-80.

Even where no question of price disadvantage to the manufacturer was involved, executives of eighteen companies testified that they had a strong policy against diversions in the interest of the protection of their dealers from invasion of their markets.[2]

Nazareth: Robeson, Vice President (R) Tr. 27956, 28069-70 (as long as witness has been with Nazareth—since 1924), 28073.
Northwestern States: MacDonald, Vice President (R) Tr. 36487 (always).
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38233 (since 1926 when Company was formed).
Petoskey: Lucas, Vice President (R) Tr. 38719-20.
South Dakota: Hartley, Sales Manager (R) Tr. 41522 (several years).
Southwestern: Warren, G. E., Vice President (R) Tr. 29120; Blair, W. R., Sales Manager (El Paso) (R) Tr. 38989-90.
Superior: McKeag, Attorney-Examiner, F.T.C. (C) Tr. 12248-49.
West Penn: McKee, Vice President (R) Tr. 27812.
Whitehall: Elliott, Vice President (R) Tr. 28579, 28670.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36040-41.

[2] Alpha: Coogan, Vice President (R) Tr. 24621-22.
Ash Grove: Sunderland, President (C) Tr. 13731-32, 13747.
Dewey: Moore, Vice President (R) Tr. 41635.
Federal: Bates, Sales Manager (R) Tr. 30628.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29539.
Hawkeye: Manley, General Manager (R) Tr. 41625-26.
Lehigh: Bowen, Vice President (R) Tr. 27248.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6114-15.
Monarch: Brooke, Vice President (R) Tr. 42312.
National: Dannelly, Vice President (R) Tr. 39579-80.
Nazareth: Robeson, *supra*, Tr. 28067-68, 28071-73, 28403-04.
Petoskey: Lucas, *supra*, Tr. 38719-20.
Southwestern: Warren, G. E., *supra*, Tr. 29122-24; Blair, *supra*, Tr. 38989-90.
Superior: McKeag, Attorney-Examiner, F.T.C. (C) Tr. 12249 (quoting Hearn of Superior).
West Penn: McKee, *supra*, Tr. 27812.
Whitehall: Elliott, *supra*, Tr. 28670-72.
Wolverine: Nelson, J. L., *supra*, Tr. 36040.
South Dakota: Hartley, *supra*, Tr. 41526-27.

Typical of this testimony is that of Sunderland, President of Ash Grove who put it this way:

"Q. Would the diversion of your cement—will you explain whether it would or not—the diversion of your cement by one of your dealers have any effect on your business with your other dealers? A. Oh, yes; and that is one of the reasons for our undertaking to control our own business. Customer psychology is a very delicate thing, and in dealing with our customers we not only find it necessary to supply them what they want when they want it and where they want it on a competitive basis, but we have to do more than express to them a desire to protect their interests. We have to show that we have the ability to prevent intrusions into their local territory of our products from other dealers outside of their territory. If we didn't do that we would lose their good will and lose their business, and it is essential for us, for the protection of our own business, to have that control as we have on all of our business with the dealers or with the contractors.

By Trial Examiner Norwood:

Q. Then, in substance, a diversion will enable an outside dealer to undersell a dealer at a given point? A. Not necessarily. It might not enable him to undersell, but will enable him to intrude himself upon the territory,—poach on the preserves, as it were, of another dealer who perhaps had spent years and years to build up a trade on our brand."[3]

Coogan, Vice President of Alpha, testified:

"Q. With regard to the subject of diversions in transit, hasn't the Alpha Company been interested in preventing such diversions only in cases where it operated to reduce the delivered price? A. No, we have been—we have done everything we could in our company to prevent diversions of any kind.

Q. Regardless of their effect on the delivered

[3] (C) Tr. 13731-32.

price? A. Yes, sir; because it disturbs our market conditions and price is not the only consideration.'"[4]

Robeson, Vice President of Nazareth, said:

"A. Well, it affects us from the standpoint that if it got into a town where we had agreed to let the sale of our product alone to one dealer and another dealer came in there, it would cost us the good will of the dealer in that town. That would probably be the most serious thing that could happen to us.

Trial Examiner Norwood: And does diverting make a savings in the expense,—he would be enabled to undersell your dealer?

The Witness: Well, I have seen a number of diversions, your Honor, where the dealer in a town not only did not save any money, but he also was out the diversion charge; but, nevertheless, in order to get our brand in that particular town where we would not sell him, he was glad to go to that expense.

Trial Examiner Norwood: Well, you cannot prevent him from doing that, diverting?

The Witness: Well, we tried to keep him from diverting, that was our idea, to keep him from doing it.

Trial Examiner Norwood: If he is going to do it at a loss, he could do it without diverting?

The Witness: He could do it of his own—out of his own home town, truck it over, and we would have no control over that, and our own local dealer could not criticize us.'"[5]

Elliott, Vice President of Whitehall, speaking of the importance of diversions to his company, said:

"A. Well, if a man diverted a car of cement into a town where you had a very good dealer, he would be right on your back as to why you were permitting

[4] (R) Tr. 24621-22.

[5] (R) Tr. 28070-71.

another fellow to ship a car of cement in to his town when he could take care of it, and had always taken care of it, and would do it again, and the result would be he wouldn't buy any more from you."[6]

Moore, Vice President of Dewey, stated that shipments diverted in transit had caused good customers at the destinations to which the shipments had been diverted to complain to Dewey about the invasion of their territory by an outside dealer.[7]

Brooke, Vice President of Monarch, asked whether his dealers complained about diversion, replied "Those that were affected by the diversions of our cement complained, and that puts it rather mildly."[8]

Lucas, Vice President of Petoskey, testified that diversions were not much of a problem with his company[9] and stated that their objection to diversions was that they "interfere with our maintaining satisfied customers."[10]

G. E. Warren, Vice President of Southwestern, testifying to the effect of diversions, said:

"A. The principal effect is the interference with our regular resale outlets at the point to which the diversion was made.

By Mr. Withrow:

Q. Have you ever had any complaints from any other dealers as the result of such diversions? A. Yes, sir.

Q. And what was the nature of these complaints? A. Refusal to continue to handle our cement if we were going to permit out-of-town people to ship it in there and distribute it, as had been done."[11]

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[6] (R) Tr. 28670-71.

[7] (R) Tr. 46635.

[8] (R) Tr. 42312.

[9] (R) Tr. 38817-18.

[10] (R) Tr. 38815-16.

[11] (R) Tr. 29122.

Executives were also examined as to the effect of diversion on delivered prices.

Sunderland, President of Ash Grove, when questioned on this point testified:

> "Q. Now, Mr. Sunderland, in your long experience in the industry haven't you known of diversion of shipments being used by customers to divert the car into a higher priced delivered price territory at a lower price? A. Why, certainly I have known of diversions that were made in the interest of the people who diverted them and contrary to our contract and our policy.
>
> Q. You are aware of the effect of diversion on delivered prices? A. And we tried to avoid them by contractual relation.
>
> Q. And you are aware of the effect on delivered prices of diversion of cars? A. We were aware of the effect upon our treasury of cars that were diverted to some point where we got less than our market price at that point.
>
> Q. Didn't you get the same amount on that car no matter where it was shipped? A. No, sir. That is, when I say the same amount, we didn't realize the same net at all points.
>
> Q. Well, you got the amount on which the original sale was figured, didn't you? A. Possibly so.
>
> Q. And what difference did it make where that car went as to the amount that you got out of that car? A. Makes a difference between our price at that point and the price at the point at which we contracted with the dealer to buy it.
>
> Q. And so it resulted in lower delivered prices at the point where you didn't intend it to be lower, is that right? A. If it resulted in depriving us of part of our profit we were opposed to it."[12]

Koch, Vice President of Lone Star, was examined as to the effect of diversions in interfering in the maintenance of an identical delivered price at the destination to which the shipments were diverted and he answered that that pos-

[12] (C) Tr. 13627-28.

sibility was not a reason for objection. His testimony continued:

> "Q. Do you mean that ~~that is~~ not a reason that has entered into it? A. Not a reason as you stated it; no.
>
> Q. Well, it would interfere with your delivered price there, would it not? A. It would interfere with my customer there.
>
> Q. And it would interfere with your delivered prices? A. It would lower my delivered price at that point, if it was diverted from a low-price section into a high-price section, and you would not get the freight.
>
> Q. If your delivered price were lowered by that diversion-in-transit transaction in a particular case, it would be lower than the delivered price of your competitors there, would it not? A. Well, they could divert just as well as I could."[13]

Neylan, Assistant General Sales Manager of Lone Star, examined as to the possibility of interference with prices by diverted cement, testified that this was not necessarily true and that "It all depends on the purpose that the party had in mind in diverting the car." It was possible that the diverting dealer might just put the added profit in his pocket and not undersell.

> "A. As a matter of fact, the chances are a hundred to one if he is able to do it, unless he is caught out on a limb, he will do just that."[14]

Asked if one reason for objection to diversions was that the purchaser might get the cement at a place at less than the regular destination price there Neylan testified further:

> "A. That is probably one of the reasons, but in my opinion it is dishonest.

[13] (R) Tr. 33259-60.

[14] (C) Tr. 6698-99.

Examiner Norwood: You mean diversion: You consider diversion dishonest?

The Witness: Yes, sir.

By Mr. Wooden:

Q. What harm does it do to the shipper? A. It takes some of the shipper's money away from him, for one thing. In other words, he gets the benefit of a price and then he gets the benefit of a freight allowance that usually he does not have to pay. In my opinion he is stealing that money.

Q. He is paying you the same in each particular case? A. It doesn't make any difference. He usually pays the railroad less money than we allow him on the invoice, and to that extent, in my opinion he is stealing the difference.

Q. As far as the shipper is concerned, you would get neither more nor less under that state of affairs; you would get the same amount? A. We get less than if we shipped it to the point that he reconsigned it to.

Examiner Norwood: How is that?

The Witness: Because we would allow him a greater amount of freight than he pays.

By Mr. Wooden:

Q. You would not net any less though, would you? A. We probably would.

Q. You are comparing it—— A. (Interposing) There are cases where we would.

Q. You are comparing it to his price in the event that you sold it to some one else at that destination? A. That is right.

Q. But selling it to him alone, your net would be the same whether he diverts it or not? A. Doesn't it follow, Mr. Wooden, that if he diverts a car from one point to another, that there is a demand for a car of cement at the new point that we have an opportunity of selling, therefore he is taking it out of our hide."[15]

[15] (C) Tr. 6114-15.

W. R. Blair, Sales Manager of Southwestern (El Paso), stating his reasons for opposing diversions, testified:

> "A. Well, there are two main reasons. One is that, as a rule, the dealer diverting the shipment does not have a yard or place of business in the town to which he is diverting or trying to divert the car, and that, of course, gets us in trouble with the dealer located at that point. Another reason, and the only other reason that I can recall offhand, is that it is usually attempted to divert from a point that has a better net for us into one that has a lower net, and thereby we are deprived of the proper return on the cement for the point to which it is shipped."[16]

Dawson, Vice President of Medusa, asked for the reasons his company opposed and tried to prevent diversions in transit, answered:

> "A. The reason that we found cases where the cement diverted in transit gets into—gets into a destination which is conflicting with a dealer at that particular destination.
>
> Q. And in sales at different prices than those you quoted there? A. That is usually the cause of the diversion, if any.
>
> Q. Well, that is the fact, isn't it? A. Yes. They buy at the lower price based on a particular destination and have it diverted to a destination higher price and undersell our regular dealer at the higher price destination.
>
> Q. But the fact of the diversion itself does not result in you securing any lower mill net on that shipment than would have been the case if it had not been diverted, is that correct? A. That is correct."[17]

Elcock, Vice President of Southern States, testifying to his experience while a salesman for Universal Atlas, and commenting vividly upon the fact of diversions in a market

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[16] (R) Tr. 38989-90.

[17] (R) Tr. 40592.

in which there is a difference in delivered price between points within a short distance of one another, said:

"Q. That would not have been possible if you had been selling on an f.o.b. mill price to all of them, would it? They could not divert and get such advantages one over the other? A. They could not divert, but you would have probably just as much trouble in New York City—have as much trouble as the other way."[18]

• • • •

"A. At the time when I was district manager, district sales manager, for the Universal-Atlas Cement Company it was possible to bring a carload of cement into what was known as the Bush Terminal, for one thing, at a flat rate of 38 cents per barrel; and at the same time there were other points in Brooklyn within two or three miles where the freight rate was as much as 63 cents per barrel, very widespread.

The dealers would give me an order for a car of cement to be delivered at the East New York yard, which took a 63-cent rate, and when the cement was in the process of coming over, at a cost of $2 or $2.50, they would order it diverted in transit, and have it put down at the Bush Terminal, and they would haul it that two miles and make 25 cents for themselves, with the result that two dealers located across the street from each other got into a price war pretty quickly. One had a price of 25 cents—cost 25 cents under the other fellow, and we just had to stop the thing in some way.

Business was going to go to pot. We had pressure brought on us by dealers who would not do the thing. And finally it became so great that we had to do something about it.

I do not remember whether we used any stamp up there on those things, but we certainly did try our level best to stop the diversions in transit.

Trial Examiner Norwood: When you stopped it, then the price of both was the same?

[18] (R) Tr. 37632.

The Witness: Yes.

Trial Examiner Norwood: Did it go back to the higher level or the lower level?

The Witness: It would go—the price was the same, Judge. Where these fellows got away with it, they pocketed that difference in freight.

Trial Examiner Norwood: When you stopped it the price went back to the higher level, did it?

The Witness: Yes, sir."[19]

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"*By Mr. Werle:*

Now, in connection with this diversion that the Examiner has just been asking you about, when a dealer got the cement for less by diversion, did that result in affecting the net to your company on that shipment? A. Not in any way.

Q. So it was not your price that was affected? A. No.

Q. It was the dealer's price; is that correct? A. It was the dealer's."[20]

Coogan, Vice President of Alpha, reviewed the whole situation and testified:

"One is the diversion of cement purchased for a specific job, and going for a specific use and diverted or used, that cement, elsewhere; by diverting the use of that cement into other channels, but the matter of diversions most generally referred to by those outside of the industry is the matter of diversion of shipments from one point to another; that is, the customer will order cement from us and order it shipped to a particular point and then divert it en route to another point at which the freight rate may be, that is, the freight rate from our mill, would be less than to the point at which it was originally ordered. In other words, the freight that he would pay to the railroad company would be less than the freight allowance on our invoice.

[19] (R) Tr. 37641-42.

[20] (R) Tr. 37644.

Q. Going back over all of your experiences with the Alpha Portland Cement Company, would you say that it has had any consistent attitude towards diversions as to either of these classes? A. We have consistently used every conceivable effort to stop diversions of cement in both classes since 1910.

Q. Will you explain why, please? A. Well, I think the only controversial question is the matter of diversion from one destination to another here. Now, we certainly cannot continue our consumer and customer relations if we are going to allow the diversion of cement into markets where we already have dealers.

Q. Why not, Mr. Coogan? A. I think the best way is to take a concrete example of what it might mean to us. You take in Brooklyn, New York, today, there are building material dealers with yards located at the waterfront. The freight rate from our mill to those on the waterfront is forty-two cents per barrel, and in rendering an invoice to them, we bill it at our delivered price and then deduct the freight. There are many interior yards in Brooklyn which are competing with these waterfront yards, actively competing with them, to which the freight rate from our mill, and when I say our mill I will say the Lehigh Valley, because the rate is alike from all of the mills there, is fifty-nine cents per barrel.

When we render them an invoice we deduct fifty-nine cents per barrel. If we allowed the people with interior yards to go to the railroads and divert those shipments to a waterfront yard, it would mean that they were getting the cement seventeen cents a barrel cheaper than the man whose yard is located at the waterfront. Conceivably, the waterfront dealers would not permit that or would probably come to us and we would probably have to reduce our other price, our price to them, seventeen cents.

We have had one case where that was done and we collected from the railroad company for it. Then you can go along and show a great number of other instances along that same line today; but we will take another example of a little different type which will make it still clearer.

A man orders a car shipped from our mill to a point where the freight rate from our mill is sixty cents per barrel. Now, he diverts it to a point where the freight rate is forty cents per barrel. Now he is getting his cement, if we allow that laid down in that town at twenty cents per barrel cheaper, less than we are quoting today to our dealer in that town, and we certainly must protect our dealer customers, every dealer customer, and we must treat them all alike."[21]

Browder, Traffic Manager of Penn-Dixie, stating the reason for his company's policy in opposition to diversions, testified:

"A. Well, the basis of the policy is that it disturbs our customers when cement is diverted. It is generally done to secure cement at the final destination at a lower price than our regular market price at that point, and when a dealer from one place is able to do that at another place, he disrupts the business of the dealers there to whom we are selling and to whom we are trying to give protection. Not only that, but deprives us of the revenue that we would secure had we initially made the shipment to the final destination."[22]

Rooney, Vice President of Huron, discussing objection to dealers who wish to purchase f.o.b. mill, testified to his objection to diversion as a means of chiseling.

"Q. Well, those dealers preferred the f.o.b. method of selling, did they not? A. The few who were able to use that as a method of 'chiseling' liked it.

Q. And by 'chiseling,' what do you mean? A. I mean they would buy it for their own far-away destination and get a very substantial freight allowance, and then peddle it within an area that was not their own trading area.

[21] (R) Tr. 23301-03. See also Tr. 24621-22.

[22] (R) Tr. 38233.

Q. On a higher price level; in other words, they cut the price in that way? A. That is right."[23]

B. A. MacDonald, Vice President of Northwestern States, limited his company's objection to diversion to those cases where it interfered with sales more profitable to him at one point than at another. He explained:

> "A. If we would sell a car of cement to a point in Northern Minnesota at less than our maximum mill net, where the price was fixed by competition from, say Steelton, and that car was diverted to, say, Minneapolis, at a point where we would receive our maximum mill net, and the dealer in transmitting to their car would pay on the basis of the price of the destination that the car was ordered to, we would receive less for the cement that was diverted in Minneapolis than we would have if we had sold to Minneapolis in the first place.
>
> Q. Irrespective of where he diverts it to, you receive no less than your contract with him calls for on a particular shipment, don't you? A. That is right. Yes, sir; you are right.
>
> Q. In other words, it makes no difference as to that contract with him; you get just as much money? A. That is right."[24]

Ackerman, then Sales Manager of Lawrence, took an opportunistic attitude toward diversions, testifying:

> "A. • • • I can recall instances where we have permitted it and instances where we have refused.
>
> Q. What differentiates between the cases where you have permitted it and where you refused? A. Well, a man conceivably might have ordered more cement than was needed to complete an operation. He may have communicated with us and said: 'I have an extra car or two up in my job; help me divert it to some other party, help me dispose of it, I do not need it.'

[23] (R) Tr. 33693-94.

[24] (R) Tr. 36641-42.

That would be a case where we would acquiesce in his request, if possible, to divert. Other cases where they have attempted to buy cement from us at a destination where our price might be lower than the destination at which the car had been consigned, we tried to stop it."[25]

Elliott, Vice President of Whitehall said this:

"Q. Does the matter of price structure at these destination points involved have anything to do with your attitude on that? [diversion in transit] A. It would if there was quite a difference in the two towns, because it could—if we were shipping to one man at a higher price, and the man diverted it into the other town, he certainly would upset our market, and cause us untold trouble there.

Q. But would it have anything in the way of an effect upon the return that you received for this cement at your mill, whether it was diverted or not? A. Yes, it would have an effort [effect].

Q. How would it? A. Well, if it were diverted and shipped into a place we might receive less money for it.

Q. Than the amount shown on your invoice, for the shipment to the original consigned point? A. No, because if it were diverted there the customer would simply pay the shifting charge, or carry-on charge; but the other dealer would be right on our back on that, because he would claim that the price that he paid was entirely out of line with the price that we permitted the other dealer to pay.

Q. But it wouldn't make any difference in your mill net—— A. No, sir."[26]

Two dealers testified on this subject.

Callaghan, a dealer in Harrison, New Jersey, testified that he sent trucks from Harrison, New Jersey to Brooklyn,

[25] (C) Tr. 7340-41.

[26] (R) Tr. 28670-72.

where he purchased cement 25¢ below the Harrison price at a saving of about 15¢ plus.[27]

Duffy, a dealer in Brooklyn, testified that, because of a low price of cement in Brooklyn instituted to meet the competition with foreign cement, "people came in from Atlantic City, Philadelphia, Atlantic Highlands, up around the Scranton district and out as far as Montauk Point in all kinds of conveyances to get this cheap priced cement."[28]

C. Declarations of Diversions as an Unfair Trade Practice.

The objection of the manufacturers to diversions resulted in its condemnation as an unfair trade practice in the Code of Ethics of the Institute published in 1929 as follows:

[Italicized part quoted in Fdgs. Par. Twelve (b) and Par. Seven (o)]

"For manufacturers to divert, or to permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturers' market price at the point of final delivery, is discriminatory as between purchasers or users, and is therefore an unfair trade practice."[1]

[Objection was expressed again in Article X, "Unfair Competition", of the NRA Code approved by the President on November 27, 1933 as follows:

[Italicized part quoted in Fdgs. Par. Twelve (b)]

"To divert or permit purchasers or users of cement to divert shipments of cement from one des-

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[27] (C) Tr. 7666.

[28] (C) Tr. 7920.

[1] Com. Ex. 138 S: Code of Ethics, p. 5.
Com. Ex. 136 G-H: Minutes of Organization Meeting 8/20/29.

tination to another destination, the result of which will enable the purchaser or user to secure cement at less than the member of the industry's published market price at the point of final destination."[2]

This provision, slightly altered, appeared in the Amended Code, Article IX approved on May 11, 1935 and in effect for six days, as follows:

"Section 14. To divert or permit the diversion of shipments of cement, the effect of which will be to enable a purchaser or user to secure cement at variance from the Member of Industry's filed price terms for the point of final destination."[3]

And further Article X of this Code provided:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"To prevent diversions of cement prohibited by this Code and to insure the broadest field of active competition for all cement business offered, cement shall not be quoted or sold in quantities or for points of delivery which are not definitely specified."[4]

Concerning a diversion which would be a violation of these NRA Codes, Reiter testified:

"Q. Now, as I understand this Section 14 on diversion, diversion in and of itself was not considered an unfair trade practice but only in its effect on the destination price referred to? A. Wherever it would enable a purchaser or user to secure cement at variance from the member of the industry's filed price terms at the point of final destination.

Q. In other words, if there were a form of diversion that did not have that effect, it would not be covered by the prohibition? A. That is correct.

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[2] Com. Ex. 557, p. 338.

[3] Com. Ex. 560, p. 17.

[4] Com. Ex. 560, p. 20.

Examiner Norwood: That would be the case, would it not, so that if it were diverted the freight would be more than if the shipment went to its original destination?

The Witness: Well, the cost where it was diverted, if such thing would happen, from one destination where the destination price was $2.50 to another destination where the destination price was $2.50—that would not be a violation of the code.

Examiner Norwood: If the freight were a greater or less amount by reason of the diversion, would it affect it adversely?

The Witness: If the diversion, your Honor, were to a point at a different destination price, but where no money could be saved by the customer in so diverting, there would be no violation of that paragraph as I read it.'"[5]

Minutes of the meeting of the Code Authority held on February 20, 1934 contain the following:

"'The Griffith Company, who was the successful contractor, has been quoted a price delivered at job site by rail or barge and he proposes to divide the order among three cement companies, but as a condition of giving them the business, he requires that they deliver the cement to barges to be furnished by him, delivery to be made at his barges on the river, at a point nearest to their mill and exacts from them that they will allow him for transporting the cement below the rail freight cost from the mill to the destination at Alton, Illinois.'

The Code Authority is of the opinion that he (Griffith) violates Article X, Section 3, because in exacting delivery on to his barges at the mill he is, in effect, diverting the shipments with the object of obtaining the cement at less than the member of the Industry's published market price at the point of final destination. The Code Authority also believes that it violates Article X, Section 4(g) because the

[5] Reiter, Chairman, Cement Code Auth. (C) Tr. 3061-63.

cement manufacturer would be knowingly shipping cement by a method of transportation which would result in a concession or rebate to the purchaser. Because of the lower prices resulting from either of the above methods of delivery, the Code Authority believes it violates Article IX, Section 3, which prohibits any member from deviating from the terms and conditions and prices as established in the Code. The Code Authority is also of the opinion that it would be a violation of Article X, Section 4(j) in that it would result in a discriminatory price not available to other customers."[6]

As to the relation between the code provisions for open price and against diversions Reiter, testified:

"Mr. Reiter, when a member filed a price of $2 per barrel for a particular destination, did you consider it a violation of the code if the purchaser of the cement could have had the cement delivered to another destination which had a higher price? A. Yes, it was a violation of the code, Mr. Leisure.

Q. Could you tell us what was the purpose, if you know, of this provision? A. The purpose of the section of the NRA code prohibiting diversions was inserted in order to make the open price plan effective."[7]

In almost the same wording of the NRA Code of 1935 the provision appears under Article V, "Unfair Trade Practices", in the Compendium of Established Terms and Marketing Methods[8] approved by the Trustees, December 9, 1935 as follows:

[Italicized part quoted in Fdgs. Par. Twelve (b) and Par. Seven (q)]

"*Diverting or permitting the diversion of shipments of Industry Products, the effect of which will*

[6] Com. Ex. 630 A-C.

[7] (C) Tr. 16918-19.

[8] *Infra*, Part X, Sec. B 3, p. 1850, describes the Compendium.

be to enable a purchaser or user to secure Industry Products at variance with Member's published price-terms for point of final destination."[9]

The standard form of sales contract recommended in the NRA Code and the Compendium also had a provision relating to diversion to protect the right of the seller to cancel a contract under which a shipment had been diverted. The clause was as follows:

[Italicized part quoted in Fdgs. Par. Seven (p) and Par. Twelve (b)]

" * * If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified; * * *"*[10]

D. Measures Taken to Suppress Diversions in Transit.

1. Contract Provisions

In 1928 Dewey published a quotation form and in the stipulation of its terms thereon it is provided:

"This quotation contemplates delivery and use of material at destination shown, and if diverted or used elsewhere Buyer agrees to pay to the Seller its current price at ultimate destination of such cement."[11]

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[9] Com. Ex. 561, p. 16.

[10] Com. Ex. 557, p. 349.
Com. Ex. 561, p. 21.

[1] Resp. Ex. 3627 B.
Moore, Vice President (R) Tr. 47043.

No other quotation form and none of the order forms in evidence expressly mention diversions in transit.

2. Attempts to Collect the Higher Destination Price

Robeson, Vice President of Nazareth, testified that if there is a difference in price between the destination to which the cement was shipped and that to which it was diverted, he endeavors to collect the higher price, but has never taken any legal action to do so because the amount involved is always too small.[1] Blair, Sales Manager of Southwestern (El Paso), also testified that he tried to collect "on the basis of the point to which it was diverted."[2]

Browder, Traffic Manager of Penn-Dixie, testified that in cases of the diversion of their cement, they filed a claim against the railroad "for the difference in the price at the point to which the shipment was originally billed, and the price at the point to which it was finally delivered,"[3] and that while they had not had many such claims, they had collected on every one they filed.

Medusa and Lehigh have also filed claims and in some cases recovered from railroads the difference in the price between the points to which the shipments were originally billed and at the points to which they were diverted.[4]

3. Omission of Freight Charges on Invoices

Minutes of the meeting of members of the Institute on December 13, 1929 contain the following:

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[1] (R) Tr. 28072-73.

[2] (R) Tr. 38992.

[3] (R) Tr. 38242.

[4] Medusa: Com. Ex. 546 K-Q; Resp. Ex. 3334-3348.
Lehigh: Com. Ex. 750 A, G.

[Italicized part quoted in Fdgs. Par. Twelve (c)]

"Mr. Storey brought up the question of the application of Paragraph 14 of the Code of Ethics. After discussion, on motion of Mr. Kind, seconded by Mr. Storey, it was recommended that in order to prevent diversions in violation of Paragraph 14 of the Code of Ethics, it is desirable that no freight allowances be shown on manufacturers' invoices and that the following notation appear on all such invoices: 'Freight allowance does not appear on invoice. Receipted freight bill showing payment of freight charges to destination shown on Bill of Lading will be accepted as part payment of the invoice'."[1]

On December 21, 1929, Nelson, Vice President of Wolverine wired to McConnell, Secretary of the Institute as follows:

"Please wire your understanding of what southern mills decided to do regarding recommendation on freight allowance stop was their intention to follow practice generally throughout territory or confine to port points for present."[2]

To this McConnell replied on the same day:

"My impression is that all mills intend to follow freight allowance recommendation generally throughout territory."[3]

These two exhibits came from the files of the Institute[4] together with a telegram by McConnell, dated January 3, 1930 to Morris Kind, President of Hercules, as follows:

[Italicized part quoted in Fdgs. Par. Twelve (c)]

"Companies generally following recommendation in southeast territory stop northeast territory still under discussion."[5]

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[1] Com. Ex. 136 X.

[2] Com. Ex. 144 B-1.

[3] Com. Ex. 144 B-2.

[4] Milwee, former Attorney-Examiner, S.E.C. (C) Tr. 1394-96.

[5] Com. Ex. 141-(45).

The Findings allege that this telegram was sent concerning the recommendation passed at the Institute meeting of December 13, 1929,[6] although there is nothing in the record which explains what recommendation McConnell referred to in this telegram.

On December 21, 1929, McConnell addressed a letter to members of the Cement Institute as follows:

> "At the meeting on December 13th there was considerable discussion regarding the prevention of diversions which is covered by Paragraph #14 of the Code of Ethics. After a full discussion The Institute voted to recommend the elimination of freight allowances on invoices and as a practicable method of handling the matter further recommends the use of the following clause on all invoices,
>
> 'Freight allowance does not appear on invoice. Receipted bill showing payment of freight charges to destination shown on Bill of Lading will be accepted as part payment of this invoice.' "[7]

In a covering letter to Ackerman of Lawrence, McConnell wrote on the same day:

> "I think most of the companies plan to put this method into effect the first of January."[8]

The minutes of the Trustees' meeting held January 24, 1930, state:

> "The President brought up the action of the general meeting of members of The Institute on December 13th, 1929 with reference to requiring paid freight bills as part payment of invoices in order to prevent diversions in violation of Paragraph 14 of the Code of Ethics. On motion of Mr. Brown, seconded by Mr. Schmutz, it was unanimously resolved

[6] Findings, Par. 12 (c).

[7] Com. Ex. 992 B.

[8] Com. Ex. 992 A.

that the Trustees concur in the recommendation of the meeting of December 13th that the necessity for the application of this recommendation be left to the members and Advisory Committee for each Division; and that it was the sense of the meeting that the application of this recommendation to the Northeastern Division as a whole was unnecessary at the present time.'"[9]

Discussing the freight allowance on the invoice, as a means of detecting a diversion, Reiter testified:

"Q. In keeping the freight allowance on the invoice you are thereby able, are you not, to determine whether there was any diversion of the car for a shipper before the shipper is paid? A. No, sir, no, Mr. Wooden.

At one time some companies had in their terms of sale the requirement that the purchaser who paid this freight for account of the shipper should return their receipted freight bills for credit. But as a matter of fact they were so unsuccessful in getting all their customers to do that that it was never enforced.

In the absence of that receipted freight bill they would not know of a diversion from the invoice itself.

Q. Wasn't that one of the reasons for not allowing prepayment so that they might not be able to divert? A. No, sir. As I have said, the prepayment of freight would be a prevention of diversion.'"[10]

The record does not disclose to what extent the companies who were members of the Institute in 1929 and 1930 favored this recommendation. However, Robeson, Vice President of Nazareth, testified that in order to prevent diversions that company had attempted between May 1929 and August 1929, prior to the formation of the Institute, to secure the return of freight bills from its customers.

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[9] Com. Ex. 136 NN-OO.

[10] (C) Tr. 4067-68.

Their policy was not successful for the reason that it imposed upon the customer a burden not required of him by other companies. Robeson testified:

> "Q. Did the return freight bill show whether each consignment in transit had taken place? A. No. We found, as a matter of experience, that there were freight agents up there that were working with some of the dealers, and they would give them the freight paid bill and still divert the car.
>
> Q. Do you know whether those diversions were or were not more numerous than were other markets? A. Yes, they were numerous in that section because at that time, as I recall it, there were the so-called arbitrary prices prevailing in that locality, special low prices made by reason of foreign competition. That is my recollection of it.
>
> Q. What was the purpose of discontinuing,—rendering your invoices on this basis? A. Well, the customers did not like it, for one, and they began to make that a condition under which they would or would not give you the business. We found that there were other companies, competitors of ours, who were not doing it, and naturally they were being favored with the business, and we either had to do it or forego the business."[11]

4. Bill of Lading Stamp Prohibiting Diversion

It appears that in 1934 Traffic Managers took up with the railroads the question of placing a stamp on the bill of lading declaring the shipment covered thereby to be the property of the shipper and not subject to reconsignment or diversion without his consent. On April 13, 1934 Gubernator, Traffic Manager of Lehigh, wrote to Apgar, Traffic Manager of Alpha:

> "This will acknowledge receipt of your letter of April 12 in relation to reconsignment.

[11] (R) Tr. 28075-76.

I have been following the negotiations of the American Iron & Steel Institute. So far the response has been negative. The conclusion as expressed by the Bill of Lading Committee was to the effect that while the carriers cannot refuse to execute a bill of lading conveying notice of ownership in the consignor, they would still have the obligation of diverting or reconsigning at the request of the consignee.

I have also had the privilege of reading in detail the objections filed by the Independent Steel Fabricators Traffic Association. None of the nine points raised by them appear to me to have any merit as a matter of law.

The carriers, of course, look to the practical side and see themselves drawn in as the innocent occasion of strife between two contending forces. Therefore, their inclination is to do nothing and meet the issue when it confronts them.

What the next step may be on the part of the proponents at this time is unknown to me."[1]

Browder, Traffic Manager, Penn-Dixie, testified that Penn-Dixie began the use of a stamp on its bills of lading in May, 1935. The Lehigh and New England Railroad had advised him that the Association of American Railroads had passed a resolution permitting the use of such stamps, but the Delaware, Lackawanna & Western advised that their understanding was that the clause was to be permitted only on shipments of iron and steel. However, Freight Traffic Managers of the railroads reconsidered the subject.[2]

On April 2, 1935 H. L. Albert, General Freight Agent of the Lehigh and New England Railroad issued their circular No. 301, which was as follows:

"SUBJECT: Acceptance of Bills of Lading Bearing Notation Prohibiting Reconsignment except on Instructions of Shipper

[1] Com. Ex. 751 D.

[2] (R) Tr. 38243-44.

To All Agents:

At meeting of Traffic Executive Association March 14, 1935, Topic 24, it was decided to permit the acceptance of bills of lading with notation thereon reading substantially:

'This is the property of the shipper, and no reconsignment or diversion is to be made unless authorized by the consignor.'

by carriers and such instructions from shippers be complied with.—

This action pursuant to advise from Vice President Cleveland of Association of American Railroads.

Please be governed accordingly."[3]

On May 21, 1935 Browder sent a memorandum to Wing, also of Penn-Dixie, in which after referring to the action of the Traffic Executive Committee of the Association of American Railroads and the terms of the stamp to be allowed, he wrote:

"The above action of the Association of American Railroads was concurred in by the Freight Traffic Managers Committee of the eastern trunk line carriers at their meeting on May 14. Since the action of the above committees is binding on the railroads operating in this territory you are therefore at liberty to tender bills of lading to the railroads bearing the foregoing notation.

If it is decided that we will avail ourselves of this privilege we should notify the railroads of our intention to do so in order to initiate a smooth working arrangement. If you so desire I will be glad to notify the railroads in the east on which our mills are located."[4]

[3] Resp. Ex. 2908 B.

[4] Resp. Ex. 2908 C.

Browder testified as to a meeting of the Committee on Transportation of the Portland Cement Association in May, 1935 as follows:

"Q. Mr. Browder, did you attend a committee on transportation of the Portland Cement Association in May, 1935? A. Yes.

Q. Did you make any mention at that meeting of the railroads permitting the use of this bill of lading stamp which we have discussed? A. Yes.

Q. Will you explain the circumstances of the situation and what you had to say about it? A. Well, the mention of that particular fact was just in informal discussion and not as a part of that meeting of that committee, just discussing things of interest in the traffic and transportation field. I brought up this subject of the stamp being placed on the bills of lading.

Q. How long after you first heard of the railroads permitting the use of such a stamp did this meeting occur? A. As I recall it, it was rather shortly after I heard it, the meeting was in about——

Q. Was there any arrangement, understanding, or agreement among any of the cement representatives attending that meeting with regard to whether or not they would use the bill of lading stamp? A. No.

Q. When you left that meeting, did you know which companies would be using it and which would not? A. No.

Q. Was there any other discussion concerning the subject at that meeting? A. Not that I recall, that I just recall discussing it in an informal way there as a matter of interest.

Q. Did anybody connected with the Penn-Dixie Company, Mr. Browder, have anything to do with securing the railroad consent to use such a notation on the bill of lading?

* * *

Q. Apply that question, Mr. Browder, to yourself. A. No, not initially. I had nothing to do with the

initial authorization of the Association of American Railroads to permit that on bills of lading.'"[5]

And further:

"Q. Do you know whether any company used the bills of lading stamp prior to May, 1935? A. I do not know whether they did or not."[6]

On December 18, 1935 Browder sent the following letter:

"Mr. J. C. Bowen, V-P Lehigh Portland Cement Company, New York, N. Y.

Mr. F. M. Coogan, V-P, Alpha Portland Cement Company, Easton, Pa.

Mr. F. L. Stone, V-P, Universal-Atlas Cement Company, Chicago, Ill.

Mr. S. W. Storey, V-P, Signal Mountain Port, Cement Co., Chicago, Ill.

Mr. J. F. Neylan, AGSM, International Cement Corporation, New York, N. Y.

Mr. R. E. Nicholson, V. Pres., National Cement Company, Birmingham, Ala.

Mr. Walter Elcock, V-P, Southern States Port-Cement Co., Rockmart, Ga.

Mr. Charles F. Lewis, Manager, Volunteer Port. Cem. Co., Knoxville, Tenn.

Mr. E. W. McGovern, SM, Hermitage, Port. Cem. Co., Nashville, Tenn.

Mr. J. H. Dalbey, SM, Cumberland Port. Cem. Co., Cowan, Tenn.

Mr. D. S. Colburn, V. Pres., Marquette Cement Mfg. Co., Chicago, Ill.

Mr. A. W. Horner, V-P, Kosmos Portland Cement Co., Louisville, Ky.

Mr. E. D. Hill, V-P, Louisville Cement Company, Louisville, Ky.

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[5] (R.) Tr. 38249-50.

[6] (R.) Tr. 38252.

Gentlemen:

Subject: *Acceptance of Bills of Lading Bearing Notation Prohibiting Reconsignment Except on Instructions from Shipper.*

[Italicized part quoted in Fdgs. Par. Twelve (d)]

As information, the Traffic Executive Committee of the Association of American Railroads at their meeting on March 14, 1935, under Topic #24 approved the acceptance of bills of lading by the railroads bearing notation reading as follows:

'This is the property of the shipper and no reconsignment or diversion is to be made unless authorized by the consignor.'

This notation has been stamped on the bills of lading covering shipments moving in the east since the middle of last May and has worked out very satisfactorily. Therefore, if you desire you can tender your bills of lading bearing the same notation.

It would be well if you should desire to use this notation to notify the railroads serving your mill of your intention so as to initiate a smooth working arrangement.'[7]

As to the circumstances which led him to send this letter, Browder testified:

"A. Well, after putting the stamp on the bills of lading at the mills in the East, we find that it did have the desired, that is, it prevented diversions. We were then determined to put it on our bills of lading in the South where we have had a particularly lot of trouble, and I had been working in the South and was familiar with the many difficulties we had down there, and I wrote this letter to the officers of other companies advising them of the stamp in the hopes that they would use it; in other words, their diversions, diversions of their shipments worried us

[7] Com. Ex. 584 G.

almost as much as the diversions of our own shipments in that whenever cement, whether it is our cement or anybody else's cement, would go into a dealer's town at a lower price than he could buy it, then he would get after us to do something about it, and it worried us as much as our own diversions did.

* * * * *

Q. Mr. Browder, did you have any agreement or understanding or arrangement with any of the traffic managers or representatives of any other cement manufacturing company in connection with the use of this bill of lading stamp either before or after you wrote your letter of December 18, 1935? A. No."[8]

Stutz, a Traffic Manager of National, replied to Browder on December 20, 1935:

"We acknowledge your letter of December 18 addressed to Mr. Nicholson, with reference to acceptance by the railroads of bills of lading bearing a rubber stamp regarding diversion.

We have used a stamp similar to the one mentioned in your letter for the past seven or eight years, which is placed on all of our bills of lading and which, in turn, has been placed by the Seaboard agent on the waybills and needless to say, we have found it a very important notation in prohibiting reconsignment or diversion in transit.

We appreciate your writing us, as we have often wondered just how the other companies prevented diversion in transit in the absence of such a stamp or notation on the waybill."[9]

On May 18, 1935, Guy, Traffic Manager of Universal Atlas, wrote to Gubernator, Traffic Manager of Lehigh, as follows:

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[8] (R) Tr. 38247-49.

[9] Resp. Ex. 3040.

Resp. Ex. 3041: Copy of National's bill of lading, dated 7/1/30 bearing the stamp.

"Referring to discussion at meeting of Committee on Transportation with reference to placing notation on bills of lading to the effect that the property belongs to the consignor and should not be reconsigned without consent of the owner.

Will you kindly send me the exact wording of this notation as approved by the Association of American Railroads and reference to action taken by the Eastern Trunk Lines or other associations?

I believe it was generally understood that traffic managers would notify the Sales Departments that this notation can be placed on bills of lading and should be respected, altho it is admitted there would be little chance of securing damages if a car was reconsigned without consent of the shipper."[10]

On July 14, 1936 Oliver, Freight Traffic Manager of the Pennsylvania Railroad, wrote to Gubernator referring to the language of the stamp as approved by the Traffic Executive Committee and adding:

[Italicized part quoted in Fdgs. Par. Twelve (d)]

"Under advice of Trunk Line Counsel, however, should a consignee request a diversion, the carriers are obligated under their tariffs to ascertain who the real owner is and comply with his instructions."[11]

Coogan, Vice President of Alpha, examined as to the part which his company played in securing acceptance of this stamp by the railroads, testified:

[Italicized part quoted in Fdgs. Par. Twelve (d)]

"Q. Now, referring again to this matter of diversion in transit, did your traffic manager, Mr. Apgar, work with traffic managers of other cement companies in inducing the American Association of Railroads to accept the stamp on bills of lading regarding diversion? A. Yes, sir; I think he did.

[10] Com. Ex. 749 VV.

[11] Com. Ex. 749 A.

Q. Do you draw some distinction between your company working with competitors in some such way as that and understanding or an agreement among them? A. I certainly think that we have a perfect right to act with our competitors on anything that will improve or bring about a better freight rate and freight service situation at our mills.

Q. Well, did the stamp restricting diversions come within the category you just named? A. I think it does, yes.

Q. In what way? A. Well, it puts a certain moral obligation on the railroads not to divert shipments without the approval of the shipper, and inasmuch as we sell at delivered prices we feel that we have a perfect right to control the shipment until it reaches destination.

• • •

Q. I believe my question was directed to whether you drew any distinction between an understanding or agreement with competitors, and just working together with competitors towards a certain end. A. I think I answered that question and told you I thought we had a perfect right to work with competitors on a matter of rates and freight service, and kindred matters of that kind.

Q. I am still seeking to get your conception of what an agreement or understanding is, by asking you if that is one, or whether that is just merely working together. A. Why, no, it is no agreement; it is simply working together.

Q. All right.'"[12]

At least 23 manufacturers used this stamp on their shipments at one time or another.[13] In several cases the use of

[12] (R.) Tr. 24626-27.

[13] Alpha: Coogan, Vice President, (R) Tr. 23334-35.
Colorado: Com. Ex. 2469-70: Letters dated 9/1/36 and 9/10/36 between Flint, Mt. States Lbr. Dealers Assn. and Warner of Colorado.
Coplay: Com. Ex. 295 D: Memorandum dated 9/10/35 from Twamley of Coplay to Stewart, Coplay.

the stamp was prompted by the suggestion of railroad traffic managers. Thus Dewey used the stamp at the suggestion of a railroad after a complaint by Dewey concerning a diversion.[14] Hawkeye used the stamp at the suggestion

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Dewey: Moore, R. W., Vice President (R) Tr. 46635-36.
Federal: Bates, J. E., Sales Manager (R) Tr. 30627.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29538.
Hawkeye: Manley, General Manager (R) Tr. 41641.
Hermitage: McGovern, Sales Manager (R) Tr. 36234-37; Resp. Ex. 2697.
Huron: Meyers, Traffic Manager (R) Tr. 33341, 33575.
Kosmos: Horner, President (R) Tr. 36953.
Lawrence: Com. Ex. 266 A, B: Memorandum dated 9/20/35, Ackerman, Sales Manager, Lawrence to Bowe, District Sales Manager.
Lehigh: Com. Ex. 750 A, G: Letters dated 12/33/37 and 10/13/37 between Clous, Asst. Traffic Manager, Lehigh and Freeman, Pennsylvania R.R.
Lone Star: Com. Ex. 286 G: Letter dated 9/10/35, Neylan, Lone Star to Cooper.
Marquette: Colburn, Vice President (R) Tr. 40007-08.
Medusa: Cole, Traffic Manager (R) Tr. 41098-102; Resp. Exs. 3329, 3331.
Monarch: Brooke, Vice President (R) Tr. 42312.
National: Dannelly, Vice President (R) Tr. 39579-80, 39783; Resp. Exs. 3040-3041.
Nazareth: Robeson, Vice President (R) Tr. 28056-58.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38234, 38243-44. Resp. Ex. 2908: Penn-Dixie interoffice memos, 4/2/35 through 5/28/35.
South Dakota: Hartley, Sales Manager (R) Tr. 41523. Resp. Ex. 3365 E-J: Billing forms used by South Dakota.
Southern States: Formerly used it, not now. Elcock, Vice President (R) Tr. 37547.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38990-91, 39360.
Superior: McKeag, Attorney-Examiner, F.T.C. (C) Tr. 12248-49.

[14] Resp. Ex. 3585 B: Moore to Watson Missouri Pacific Railway, 5/23/35.
Resp. Ex. 3585 A: Watson to Moore 5/23/35.

of the Rock Island Railroad Agent.[15] Railroad officials advised Medusa early in 1935 that other industries were using a stamp to prevent diversions and Medusa began the use of it on May 17, 1935.[16] Nazareth's attention was called to the stamp by the Delaware, Lackawanna & Western Railroad.[17] Hermitage adopted the stamp after discovering it on a bill of lading covering white cement bought from Medusa.[18] Kosmos came across the stamp in actual use and adopted it in case the problem of diversion should arise.[19] The non-respondent South Dakota used the stamp although it does not appear how it came to its attention.[20]

Two respondents have never used a bill of lading stamp.[21] The manufacturers using the stamp expressly denied that it was used as the result of any agreement or demand to use it.[22]

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[15] Manley, General Manager, Hawkeye (R) Tr. 41641-42.

[16] Resp. Ex. 3331: Interoffice memo 5/18/35, Cole, Traffic Manager, Medusa.
Cole (R) Tr. 41102-03.

[17] Robeson, Vice President, Nazareth (R) Tr. 28092-93.

[18] McGovern, Sales Manager, Hermitage (R) Tr. 36232-34; Resp. Ex. 2696.

[19] Horner, President, Kosmos (R) Tr. 36953.

[20] Hartley, Sales Manager, South Dakota (R) Tr. 41522; Resp. Ex. 3365 E-J: South Dakota bills of lading.

[21] West Penn: McKee, Vice President (R) Tr. 27812.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36041.

[22] Alpha: Coogan, Vice President (R) Tr. 23335.
Dewey: Moore, R. W., Vice President (R) Tr. 46638-39.
Federal: Bates, J. E., Sales Manager (R) Tr. 30627.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29538.
Hawkeye: Manley, *supra*, Tr. 41647.
Hermitage: McGovern, *supra*, Tr. 36237.
Huron: Meyers, Traffic Manager (R) Tr. 33575-76.
Kosmos: Horner, *supra*, Tr. 36953.
Marquette: Colburn, Vice President (R) Tr. 40007-08.

E. Denials of Agreement as to Diversions in Transit.

Several witnesses testified that they had very little experience with diversions or that they presented no problem so far as their respective companies were concerned.[1]

All of the witnesses who were examined upon the existence of any agreement stated that their attitude toward, and the measures taken against diversions was not the subject of any agreement.[2]

Medusa: Cole, Traffic Manager (R) Tr. 41105.
National: Dannelly, Vice President (R) Tr. 39579-80.
Nazareth: Robeson, Vice President (R) Tr. 28092-93.
Petoskey: Lucas, Vice President (R) Tr. 38720.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38240, 38249.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38991.

[1] Hawkeye: Manley, General Manager (R) Tr. 41626.
Kosmos: Horner, President (R) Tr. 36953.
Missouri: Alexander, President (R) Tr. 37134.
Northwestern States: MacDonald, Vice President (R) Tr. 36487.
Petoskey: Lucas, *supra*, Tr. 38817.
Southern States: Elcock, Vice President (R) Tr. 37546.
Southwestern (Ohio): Warren, G. E., Vice President (R) Tr. 29120.
Whitehall: Elliott, Vice President (R) Tr. 28579.
West Penn: McKee, Vice President (R) Tr. 27812.

[2] Bessemer: Warren, F. B., Vice President (R) Tr. 32408.
Federal: Bates, J. E., Sales Manager (R) Tr. 30627.
Hawkeye: Manley, *supra*, Tr. 41626.
Kosmos: Horner, *supra*, Tr. 36953.
Missouri: Alexander, *supra*, Tr. 37134.
National: Dannelly, *supra*, Tr. 39580.
Northwestern States: MacDonald, *supra*, Tr. 36487.
Petoskey: Lucas, *supra*, Tr. 38817.
Southern States: Elcock, *supra*, Tr. 37644.
Southwestern (Ohio): Warren, G. E., *supra*, Tr. 29121.
Wolverine: Nelson, Vice President (R) Tr. 36041.
South Dakota: Hartley, Sales Manager (R) Tr. 41553.

PART IX

EARLY TRADE ASSOCIATIONS

[As noted in the Foreword to Appendix A, respondents have assigned error to the action of the Commission in receiving evidence or giving any consideration or weight in making the Findings to all of the evidence digested in this Part.]

A. The Association of American Portland Cement Manufacturers.

The history and activities of this Association (hereinafter called the AAPCM) are based on excerpts from the minutes of the Association[1] going back as early as 1903 and coming down to 1911 and later[2] obtained from the files of the Department of Justice[3] and identified by Kemp, Special Agent, Department of Justice. He testified that the originals came from the Portland Cement Association office in Chicago in response to a subpoena duces tecum served prior to 1921.[4] In 1920 or 1921 witness had stenographers make certain excerpts which were checked by the witness and two other agents against the originals and the originals were returned to the Portland Cement Association office in Chicago on October 25, 1921.[5]

The AAPCM was formed on September 11, 1902 and it lasted until May, 1916 when it was reorganized and its name changed to the Portland Cement Association.

The call for the first meeting that resulted in the organization of the AAPCM stated "the undersigned, Manu-

[1] Com. Exs. 3235 A-Z 114, 3236 A-Z 107.

[2] (R) Tr. 28118.

[3] (R) Tr. 28132-33.

[4] (R) Tr. 28118-19.

[5] (R) Tr. 28119, 28120-22; Com. Ex. 3237 C; Letter dated October 25, 1921, Kemp to PCA.

facturers of Portland Cement, recognizing the fact that the present methods of handling the subject of 'sacks' are almost universally unsatisfactory, and believing that the question can be profitably discussed and a satisfactory plan evolved at a meeting of the representatives of the Eastern Mills, hereby pledge themselves to attend such a meeting to be held at such time and place as may be most convenient to a majority of those signing.'"[6]

There were twenty-two signers; among them were the following ten respondents:

Alpha	Lehigh
Coplay	Nazareth
Edison	Vulcanite
Glens Falls	Whitehall
Lawrence	Atlas (Universal Atlas)[7]

At that time there were 65 Portland cement mills in the United States.[8] At the close of 1903 the membership was 41;[9] among them were three additional respondents, who did not sign the original call, Castalia, Medusa (Sandusky) and Peerless.[10]

During 1904 eleven new companies were elected to membership, one had resigned and one was expelled for nonpayment of dues. The membership was 50 companies, with a total productive capacity of 27,000,000 barrels representing approximately 90% of the total productive capacity of the United States. During that year the respondents Diamond, Marquette, and Wolverine became members,[11] bringing the total of respondents to 16.

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[6] Com. Ex. 3359: Reproduction of the original call.

[7] Id.

[8] Resp. Ex. 411, p. 451: Proceedings of American Society for Testing Materials.

[9] Com. Ex. 3235 T.

[10] Com. Ex. 3235 C.

[11] Com. Ex. 3235 T.

There is no evidence as to membership for 1905, 1906, 1907. The respondent Universal (Universal Atlas) appears to have become a member in 1906;[12] Kosmos and Superior and the non-respondent Louisville, in 1907.[13] During 1908 ten mills were added to the membership which numbered 66 companies. The membership represented 90,818,000 barrels or over 92% of the total output of the United States. During the year one mill was dropped for non-payment of dues.[14] During 1908 the respondents Ash Grove, Dewey, Northwestern States, Oklahoma, and Wabash became members, bringing the total of respondents to twenty-three.[15]

By June 1910 the non-respondent Allentown and the respondents Colorado, Monarch, Missouri (Union Sand) and Pacific were members. The total membership of 53 included the Canada Cement Co., Ltd. and 24 respondents.[16] Kosmos appears to have resigned as there is no record of its attendance at meetings after April 1909 and until December 1912.[17] Likewise, Alpha and Lehigh may have resigned in 1910 as there is no record of their attendance at meetings after September 1909 and until December 1912.[18]

In 1911 six new members were elected, three members were dropped and three resigned and four applications for membership were accepted in December. At this time the membership embraced at least 75% of the productive capacity of the country.[19] The demand for the AAPCM

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[12] Com. Ex. 3235 Z 11.

[13] Com. Ex. 3235 Z 12.

[14] Com. Ex. 3235 Z 37.

[15] Com. Ex. 3235 Z 34.

[16] Com. Ex. 3235 Z 48-Z 50.

[17] Com. Exs. 3235 Z 40, 3236 Z.

[18] Com. Exs. 3235 Z 46, 3236 Z.

[19] Com. Ex. 3235 Z 108.

bulletins amounted to 271,000 pamphlets or 7 times as many as purchased two years previous.[20] The resignations may have been those of Medusa (Sandusky), Monarch and Pacific as these companies are reported as non-members in December 1913.[21] There is no record of attendance by Marquette after June 1911 until May 1915.[22] The membership was now 64 companies of which 23 were respondents; the respondents Huron and Utah becoming members in 1911.[23]

In December 1912 the AAPCM completed its tenth year during which period the production of cement increased from 17,000,000 barrels to over 80,000,000. The membership was 65, five members having resigned and six were elected in December 1912. Aside from the Pacific Coast mills, the membership represented over 93% of the productive capacity of the country.[24] Alpha, Kosmos and Lehigh attended the meeting in December.[25] The membership included 23 respondents. Three of the resignations may be those of Utah, whose last attendance was at the meeting in May, 1912; Wabash who attended no meetings after June 1911, and Marquette whose last attendance, until May 1915, was in June, 1911.[26] The promotional work of the AAPCM became very active during this year.[27]

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[20] Com. Ex. 3235 Z 109.

[21] Com. Ex. 3236 Z 32, Z 33.

[22] Com. Exs. 3235 Z 83, 3236 Z 32, Z 68.

[23] Com. Ex. 3235 Z 83, Z 108.

[24] Com. Ex. 3236 Z, Z 1.

[25] Com. Ex. 3236 Z.

[26] Com. Ex. 3236 U: for Utah; Com. Ex. 3235 Z 83: for Wabash and Marquette.

[27] Com. Ex. 3194: Letter, dated Dec. 1, 1919, Kinney to Knickerbocker P. C. Co.

During 1913 three new members were obtained, among them being Giant, and three members were persuaded to continue their membership.[28] Membership was 68 with two resignations, that of California and Colorado, to take effect December 31, 1913.[29] 23 respondents were members. There is no evidence as to California's election to membership as this company never attended any meetings of the AAPCM.

At the close of 1914 the membership was 70 companies, one having just resigned, and three new members having been elected. Two of these appear to be Medusa (Sandusky) and Utah[30] and the resignation that of Dewey.[31] Twenty-four respondents were members.

In September 1915 Union, Three Forks, Superior Portland, Pacific, Riverside, and Santa Cruz together with three non-respondents were elected to membership.[32] During the year a total of eleven new members were elected[33] four of which may have been Colorado, Marquette, Trinity,[34] and Southwestern (El Paso).[35]

The resignation of Coplay was accepted to be effective on December 31, 1915.[36]

At the beginning of 1916, and at the time of its reorganization and change of name, the AAPCM membership appears to have been 79 and included the membership of 33 respondents, as follows:

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[28] Com. Ex. 3236 Z 32.

[29] Com. Ex. 3236 Z 39.

[30] Com. Ex. 3236 Z 61, Z 64.

[31] Com. Ex. 3236 Z 91.

[32] Com. Ex. 3236 Z 86.

[33] Com. Ex. 3236 Z 91.

[34] Com. Ex. 3236 Z 68.

[35] Com. Ex. 3236 Z 80.

[36] Com. Ex. 3236 Z 103.

Alpha	Marquette	Superior
Ash Grove	Medusa	Superior Portland
Castalia	Missouri	Three Forks
Colorado	Nazareth	Trinity
Diamond	Northwestern	Union
Edison	States	Universal Atlas
Giant	Oklahoma	Utah
Glens Falls	Pacific	Vulcanite
Huron	Peerless	Whitehall
Kosmos	Riverside	Wolverine
Lawrence	Santa Cruz	
Lehigh	Southwestern	

Five respondents were members at various periods:

California—only record is their resignation in December 1913.[37]

Coplay—1902 to December 1915.[38]

Dewey—1908 to December 1914.[39]

Monarch—1910 to 1911.[40]

Wabash—1908 to 1911.[41]

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[37] Com. Ex. 3236 Z 39.

[38] Com. Ex. 3236 Z 103.

[39] Com. Ex. 3236 Z 91.

[40] Com. Exs. 3236 Z 33, Z 91; 3235 Z 83. Last meeting attended by Monarch.

[41] Com. Ex. 3235 Z 83: Last meeting attended by Wabash.

During the existence of the AAPCM, 1902-1916, five respondents were never members:

Respondent	Incorporated	In Production	References[42]
Aetna	1908	—	Tr. 29954
Beaver	April 1913	1917	Tr. 47764; Resp. Ex. 3765 B
Hawkeye	January 1916	—	Tr. 41601; Com. Ex. 3142 A
Oregon	August 1915	1916	Com. Ex. 3173 A; Resp. Ex. 3765 A
Southern States	1902	—	Com. Ex. 3160 A

Thirty-two respondents were not in existence prior to May 1916:

Arkansas	1927	1929	Com. Ex. 3176 J; Resp. Ex. 3765 C
Bessemer	July 1935	1921	Tr. 46172-73, 46225-26; Resp. Ex. 3765 C
Calaveras	January 1925	1926	Tr. 42850; Resp. Ex. 3765 C
Consolidated	1926	—	Tr. 13338, 13340-41
Cumberland	May 1926	1927	Tr. 39810; Com. Ex. 3132 A; Resp. Ex. 3765 C
Federal	1926	1927	Tr. 30399; Resp. Ex. 3765 C
Florida	1925 or 1926	1927	Tr. 13338; Resp. Ex. 3765 C
Georgia	December 1922	—	Com. Ex. 3116 A
Great Lakes	February 1926	1927	Com. Ex. 3151 A; Resp. Ex. 3765 C
Green Bag, Pa.	1929	1929	Tr. 47628; Resp. Ex. 3765 C
Green Bag, W. Va.	1915	1927	Tr. 29397-98; Resp. Ex. 3765 C
Hercules	August 1916	1917	Com. Ex. 3144 A; Resp. Ex. 3765 B
Hermitage	April 1922	1924	Com. Ex. 3120 A; Resp. Ex. 3765 B

[42] Com. Exs. 3116 to 3176: Individual company's answers to the Federal Trade Commission's Questionnaire of May 1931; Resp. Ex. 3765 A-C: List of New Portland Cement Plants, 1911 to 1937, from the Bureau of Mines' Mineral Yearbooks.

Respondent	Incorporated	In Production	References[42]
Idaho	July 1928	1929	Com. Ex. 3171 A; Resp. Ex. 3765 C
Keystone	June 1926	1928	Com. Ex. 3146 A; Resp. Ex. 3765 C
Lone Star	1919	—	Tr. 34667
Monolith Portland	—	—	—
Monolith Midwest		1929	Resp. Ex. 3765 C
National	1922	—	Tr. 39531; Com. Ex. 3115 A
Nebraska	1917	1914	Tr. 41959; Com. Ex. 3176 T; Resp. Ex. 3765 A
North American	August 1925	—	Tr. 33736, 33744; Com. Ex. 3124 A
Northwestern Portland	December 1926	1928	Tr. 48113; Com. Ex. 3172 A; Resp. Ex. 3765 C
Penn-Dixie	September 1926	—	Tr. 38133; Com. Ex. 3135 A
Petoskey	February 1917	1921	Tr. 38735; Com. Ex. 3123 B; Resp. Ex. 3765 B
Pittsburgh	1883	1924	Tr. 37682; Com. Ex. 3133 B; Resp. Ex. 3765 B
Signal Mountain	1923	1923	Tr. 13338; Resp. Ex. 3765 B
Spokane	February 1937	1937	Resp. Exs. 3412-3413, Tr. 47654
Standard	December 1924	1925	Com. Ex. 3169 B; Resp. Ex. 3765 B
Valley Forge	January 1927	1927	Com. Ex. 3138 A; Resp. Ex. 3765 C
Volunteer	February 1927	1928	Tr. 38606; Com. Ex. 3165 A; Resp. Ex. 3765 C
West Penn	April 1926	1927	Tr. 27667; Com. Ex. 3134 A; Resp. Ex. 3765 C
Yosemite	December 1924	1927	Tr. 42843-44; Com. Ex. 3157 B; Resp. Ex. 3765 C

[42] Com. Exs. 3116 to 3176: Individual company's answers to the Federal Trade Commission's Questionnaire of May 1931; Resp. Ex. 3765 A-C: List of New Portland Cement Plants, 1911 to 1937, from the Bureau of Mines' Mineral Yearbooks.

In May 1916 the AAPCM was re-organized and its name changed to the Portland Cement Association. The office was moved to Chicago, Illinois,[43] from Philadelphia, Pennsylvania.[44]

Activities of the AAPCM relating to subjects at issue, in so far as they are revealed in the exhibits in evidence, are set forth at the following points in this Appendix:

Part	I A 1c, pp. 24 to 25:	Standardization work
Part	II A 7a, pp. 139 to 163:	Price discussions
Part	XI B, pp. 1883 to 1884:	Information on Specific Job Contracts
Part	XI C, pp. 1927 to 1932:	Statistics
Part	XIV B 2, pp. 2264 to 2265:	Dealers

B. Portland Cement Association.

This Association (hereinafter called the PCA) was formed in 1916 as the reorganized Association of American Portland Cement Manufacturers[1] and has continued in existence ever since.[2]

During the period 1917-1928 the PCA was collecting dues on 91%-96% of the cement production of the United States.[3] In 1929 on 89%; 1930 on 84% and in 1931 on 65%.[4]

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[43] Kinney, Vice President, Portland Cement Ass'n (C) Tr. 48478-79; Com. Ex. 3189 B: Excerpts from *C.M.P.A. v. U. S.*; Com. Ex. 3194: Letter, dated Dec. 1, 1917, Kinney to Knickerbocker P.C. Co.

[44] Com. Ex. 3236 Z 98.

[1] Com. Ex. 3194: *Supra.*

[2] Kinney, *supra*, Tr. 48470.

[3] Resp. Ex. 2797, p. 3: Five Year Plan for PCA.

[4] Resp. Ex. 2797, p. 2: Id.

Porter, President, North American and a director of PCA since 1931, testified as follows as to the work of the PCA:

> "The Association operates two research laboratories in which they investigate the composition and properties of cement and the uses of cement in the manufacture of concrete, and various concrete products; they support a small technical bureau which investigates problems of manufacture of cement; they support an accident prevention bureau which has to do with the prevention of accidents in the mills of member companies. Their principal activity is that of promoting the uses of cement through technical services and investigations made to and in behalf of users of cement."[5]

The PCA has its general office in Chicago.

A pamphlet in evidence entitled "Five Year Plan for Portland Cement Association 1931-1935" deals with general office bureaus for laboratory research, structural and technical work in the use of cement products, the use of cement for railways, highways and municipal projects, advertising and publications, general education, accident prevention and insurance, conservation, and public relations. It also shows regional offices in the principal cities in all parts of the United States in charge of district engineers.[6]

The same pamphlet also states:

> "From the very beginning the Association has steered clear of merchandising or commercial disputes. It has furnished no agencies through which any member might look to the Association as an arbitrator in such matters; it has given no cause for members to correlate adjustment of commercial disturbances with membership in the association. Yet it must be fairly charged that members of the Association have in several instances withdrawn because

[5] (R) Tr. 33985.

[6] Resp. Ex. 2797, pp. 6-7: Five Year Plan for PCA.

of commercial conditions existing in territories into which they ship.

The Association is well seasoned in market extension and development work. When it was reorganized 15 years ago the plan under which it set out to operate was somewhat novel. The execution of this plan, with modifications that time and experience have proven wise, has greatly increased the demand for cement. As proof of its success, similar plans have been adopted quite generally by industries having like problems.

We require, however, longer time planning more strict adherence to programs adopted, less individual interference and more general support by cement companies in the United States.'"[7]

The general office of the Association is maintained by the payment of General Dues and the regional offices by the payment of Special Dues based on the shipment of individual members.[8]

On June 30, 1932 the membership was composed of eleven non-respondents and forty-four respondents or a total of fifty-five companies.

The following thirty respondents were not members at that time:[9]

Aetna	Florida	Peerless
Arkansas	Georgia	Pittsburgh
Bessemer	Green Bag, W. Va.	Signal Mountain
California	Hawkeye	Spokane
Castalia	Keystone	Standard
Colorado	Lawrence	Three Forks
Consolidated	Marquette	Union
Coplay	Monolith-Midwest	Utah
Edison	National	Wabash
Federal		Whitehall
		Wolverine

[7] Resp. Ex. 2797, pp. 1-3; Five Year Plan for PCA.

[8] Resp. Ex. 2797, p. 10; Id.

[9] Com. Ex. 3007-A; Membership list.

On August 1, 1932, the membership was forty-three respondents and the eleven non-respondents mentioned above. By August 1, 1932 Diamond, Petoskey and West Penn had resigned and Hawkeye with Marquette had joined.[10]

On July 1, 1937 the membership was sixty-three companies, fifty-three of whom were respondents and ten were non-respondents.

The following twenty respondents were not members:[11]

Aetna	Federal	Three Forks
Arkansas	Green Bag,	Union
Beaver	W. Va.	Utah
California	Idaho	Wabash
Castalia	Keystone	West Penn
Colorado	Lawrence	Whitehall
Coplay	Monolith-	
Edison	Midwest	

Activities of the PCA relating to subjects at issue are referred to in Appendix A as follows:

Part	I A 1c,	p. 25
"	II A 7b,	pp. 163-66
"	XI B 2,	p. 1884
"	XI D 6,	p. 2026
"	XIV B 2,	p. 2266
"	XIV C 3,	p. 2296-97
"	XIV E 1,	p. 2433-35
"	XV A,	p. 2559 *et seq.*

C. The Association of Licensed Cement Manufacturers.

The history and activities of this Association are based on Commission Exhibit No. 3196 pages 725 to 776, being

[10] Com. Ex. 3007 B: Membership list.

[11] Com. Ex. 3007 C: Id.

excerpts from the record of *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588.

The Association resulted from the agreement of December 30, 1907, known as the North American (not the respondent North American) License Agreement which licensed the members to use a patented process employing powdered coal in the burning of cement rock. The members were sixteen manufacturers, with mills in the Lehigh Valley and Hudson River districts. Nine of the sixteen companies were the following respondents:

Alpha	Glens Falls	Nazareth
Atlas	Lawrence	Vulcanite
Edison	Lehigh	Whitehall[1]

On January 6, 1911 the Association was dissolved and abandoned.[2]

During the existence of this Association 1907-1911, the following thirty-six respondents were not in existence:

Arkansas	Hawkeye	Oregon
Beaver	Hercules	Penn-Dixie
Bessemer	Hermitage	Petoskey
Calaveras	Idaho	Signal Mountain
Consolidated	Keystone	Spokane
Cumberland	Lone Star	Standard
Federal	Monolith	Valley Forge
Florida	Monolith Midwest	Volunteer
Georgia	National	West Penn
Giant[3]	Nebraska	Yosemite[4]
Great Lakes	North American	
Green Bag, Pa.	Northwestern	
Green Bag, W. Va.	Portland	

[1] Com. Ex. 3196, pp. 750-757 (Whitehall in 1909).

[2] Id., p. 726.

[3] Incorporated March 1913. Com. Ex. 3125 B: FTC Questionnaire.

[4] See p. 1785-86, Section A, *supra*.

Coogan, Vice President of Alpha, testified as follows:

"Q. Now, Mr. Coogan, coming to a new subject matter, I wish to call your attention to Commission's Exhibit 3196, and I am now referring to a document here which we may refer to as the North American license agreement. Are you familiar with the circumstances that led up to the making of that agreement, Mr. Coogan? A. Yes, sir; I am.

Q. Now, just as briefly as you can, tell us what they were?

A. In 1902 the Alpha Company purchased the plant of the Martins Creek Portland Cement Company, and shortly thereafter we found that there was a suit pending or had been instituted in the meantime against the Martins Creek Portland Cement Company for the infringement of a patented process called the Hurry & Seaman patent, which was a device for burning pulverized fuel in the rotary kilns. Prior to about that time most of the cement companies had been using oil in the burning of their clinker, but they were forced to go to coal on account of it being so much cheaper, and at that time a good many of the companies started using a device which the Atlas Portland Cement Company claimed infringed the Hurry & Seaman patent.

The case was bitterly fought, testimony was taken in this country as well as abroad, and for several years the Alpha Company continued in defense of this litigation. They were joined by four other companies, the Lehigh Company, the Vulcanite Company, the Lawrence Company, and the American Company, who joined with the Alpha Company in helping them to defend this case.

In about 1906 a settlement was reached whereby the suit for infringement was withdrawn. There was a company set up which was to build this, as well as any other patents that they might have, and the Atlas Company were to be paid a royalty of $200,000 a year for the use of this particular patent, and all of the companies who were members of this new company were to pay a royalty, including

the Atlas Company (Tr. 24022-24). (This company was the North American Portland Cement Company Incorporated in November 1906[5]). It was the intention of the holders of that patent to erect new plants in territories where new production was needed, and that by having this holding company that it would mean that perhaps fewer plants might be erected in the territories where there might be need for new production. And then shortly after that there was a decision in the Rubber Tire case which gave to the holders of processing patents a right to control prices, terms, and policies of materials manufactured with a patented process. The company then holding the patents thought that that gave them a very great value, and they decided to license other manufacturers, which they did in the northern section of the United States, and they provided prices, terms, and policies under which cement manufactured under that patented process were to be sold. This continued, I think, until the latter part of 1910. In the meantime the Sandusky Cement Company, (Tr. 24024-25) (name changed to Medusa in 1928[6]) an Ohio company, litigated the validity of the patent and there were other decisions. In fact, in that case a decision was handed down favorable to the Sandusky Company, and after which time the whole license matter was dropped and the company went out of existence.

Q. Now, with respect to your answer, Mr. Coogan, —and I noticed you said that licenses were given to manufacturers in the Northeast to manufacture that all manufacturers in the Northeast were manufacturing under this patent, or certain designated companies? A. No, as I remember it, there were several manufacturers who did not take out a license under this agreement." (Tr. 24025)

See also pages 725 to 727 of Commission Exhibit No. 3196.

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[5] Com. Ex. 3196, p. 726.

[6] Dawson, Vice President, Medusa (R) Tr. 40022.

The evidence as to connection of the License Agreement and Association with subjects at issue is set out in Appendix A, as follows:

Part II A 6, p. 134
" XIV B 2, p. 2263
" XIV E 1, p. 2433

D. Cement Manufacturers Protective Association.

The history and activities of this Association are based on Commission Exhibits Nos. 3188 A-B, 3189 A-D, 3190 A-C, 3191 A-B, 3197, 3198 A-B, 3199 and 3200, being excerpts from the record of *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588.

The Association was organized in 1916[1] and its membership was nineteen cement manufacturers located in the Northeastern section of the country in Bureau of Mines Districts 1 and 2. The following eleven respondents were among the members:

Alpha	Giant	Lehigh
Atlas	Glens Falls	Nazareth
Coplay	Hercules	Vulcanite
Edison	Lawrence	

and the non-respondent Allentown.[2]

The Association ceased its activities in January 1922.[3]

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[1] Fdgs., Par. 5.

[2] Com. Ex. 3188 B: *C.M.P.A.* v. *United States.*

[3] Coogan, Vice President, Alpha (R) Tr. 24610-11.

During the life of this Association the following twenty-six respondents were not in existence:

Arkansas	Hermitage	Pittsburgh
Bessemer	Idaho	Signal Mountain
Calaveras	Keystone	Spokane
Consolidated	Monolith	Standard
Cumberland	Midwest	Valley Forge
Federal	National	Volunteer
Florida	North American	West Penn
Georgia	Northwestern	Yosemite[4]
Great Lakes	Portland	
Green Bag, Pa.	Penn Dixie	

The activities of the Association were reviewed and approved by the United States Supreme Court.[5]

Reference is made to these activities in Appendix A as follows:

Part	II A 7c,	p. 166
"	V B,	p.
"	X A 1,	p. 1801
"	XI C 1,	p. 1932
"	XIV B 2,	p. 2265
"	XIV E 1,	p. 2435-36
"	XV A,	p. 2559 *et seq.*

[4] See p. 1785-86, Section A, *supra*.

[5] 268 U. S. 588.

PART X

THE CEMENT INSTITUTE: GENERAL

Introduction

This Part of the narrative deals with the organization and membership of the Institute, its Articles of Association, its Code of Ethics, and its Compendium of Established Terms and Marketing Methods. The services systematically and occasionally rendered by the Institute to its members are dealt with in Part XI and the freight rate book service in Part V.

A. Organization and Membership of the Institute.

Chart X-A on page 1799 shows Periods of Company Membership in the Institute from the date of organization to the date of the complaint in this proceeding and Chart X-B on page 1800 shows the percentage of members of the industry who were members of the Institute between August 20, 1929 and July 2, 1937 and the percentage of total industry capacity represented by them.

The membership as shown by Chart X-A, fluctuated between fourteen companies in the first month of organization and seventy-nine companies following the approval of the cement code of fair competition under NIRA.

The Institute was organized upon the invitation of a member of the Federal Trade Commission to reach a fair trade practice agreement; and in contemplation of such an agreement membership rose from approximately 13% of the companies in the Industry to 48% in June 1930. When the Commission failed to cooperate in the plans for a trade practice agreement, and in the face of hard times, membership declined to approximately 21% of the membership of the Industry. Upon the passage of the NIRA and the selection of the Institute as a representative of the industry

to deal with the Government, membership rose within a month to approximately 85% of the Industry in June 1933 and reached its maximum of 94% within three months after the Code became effective. Upon the invalidation of the Code by the Schechter decision the membership fell in nine months to 80% and rose during the next fifteen months to 88%.

1. The factors inducing organization of the Institute

In 1929 many organizations were being formed to represent industries in fair trade practice conferences.[1] In May 1929, W. E. Humphrey, then a member of the Federal Trade Commission, addressed a gathering of cement manufacturers in which he encouraged members of that industry to form a trade association, draft a set of trade practice rules and seek a trade practice conference with the Commission.[2] The cement manufacturers present received the Humphrey speech favorably[3] and immediately thereafter appointed a committee[4] to organize a trade association to secure the ends suggested by Humphrey. In the opinion of Coogan, Vice President of Alpha, this was the "controlling reason" for the formation of the Institute.[5]

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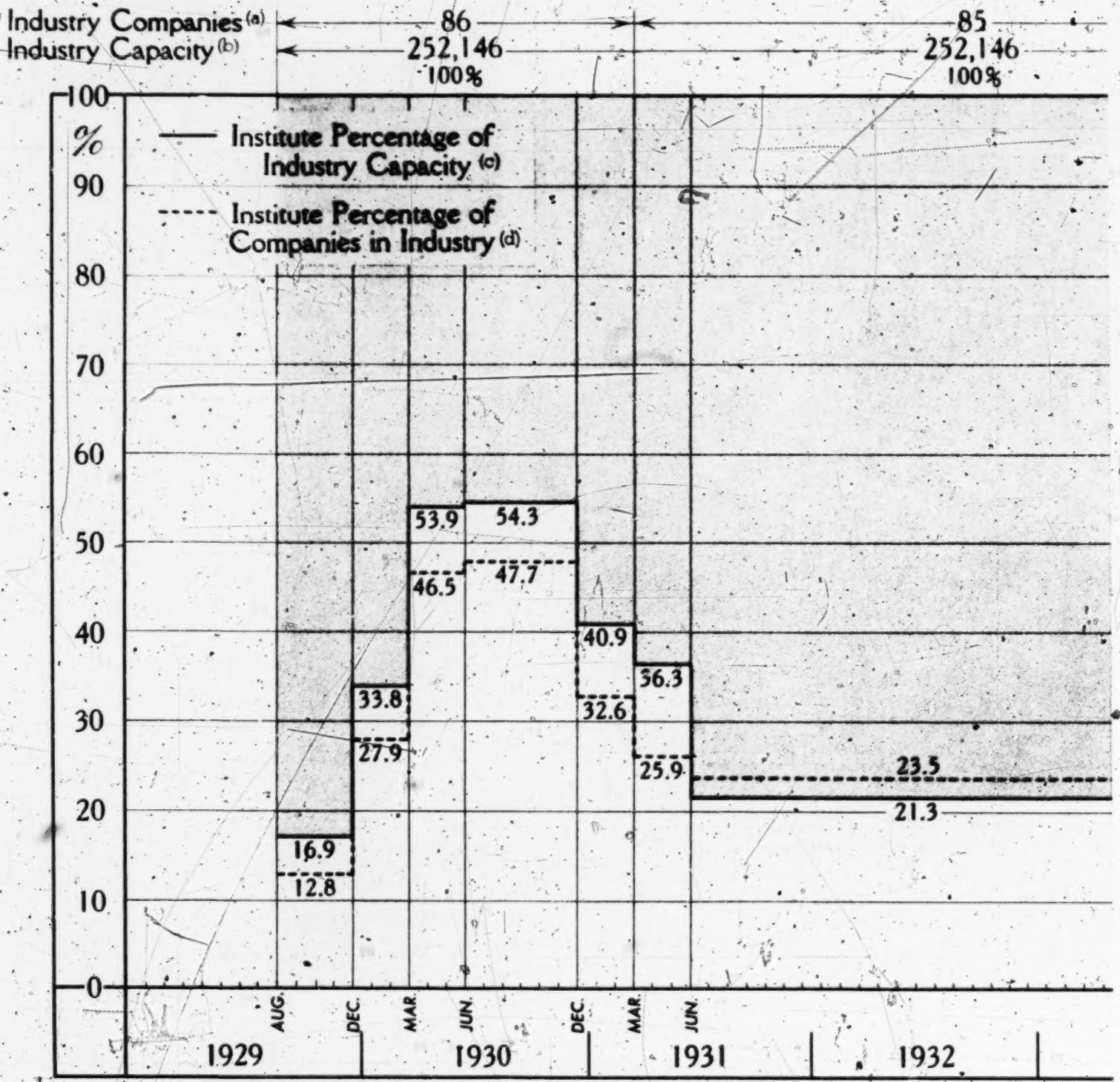
[1] Coogan, Vice President, Alpha (R) Tr. 23877-78.

[2] Hogan, President, Lone Star (R) Tr. 34560-61.

[3] Coogan, *supra*, Tr. 23889.
Bowen, Vice President, Lehigh (R) Tr. 27002.
Hogan, *supra*, Tr. 34560-61.

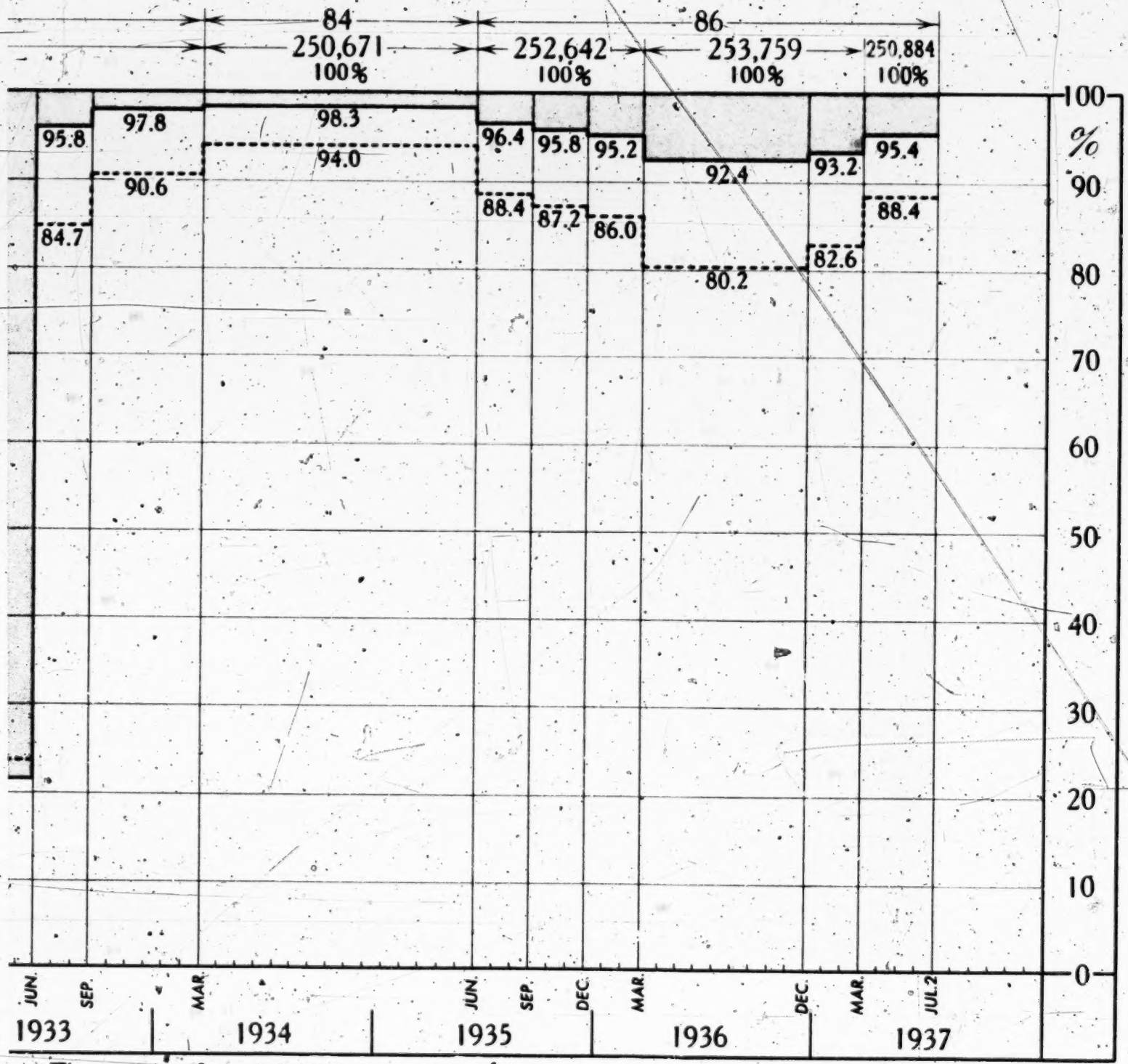
[4] B. S. Smith acted as chairman of this committee and among its members were Hogan, Hulsart and, possibly Coogan. It was formed in June or July, 1929.

[5] Hogan, *supra*, Tr. 34562.
Coogan, *supra*, Tr. 24800-01.



(a) Total number of companies is from Com. Ex. 2895 A-D; Resp. Ex. 3765 C.

(b) Individual and total capacities in barrels for 1935 and prior thereto are from Com. Ex. 2917 H-P which shows individual capacities for 1933. No individual capacities are in evidence for any other year prior to 1936; for 1936-1937, same are from Com. Ex. 3205. 000 omitted.

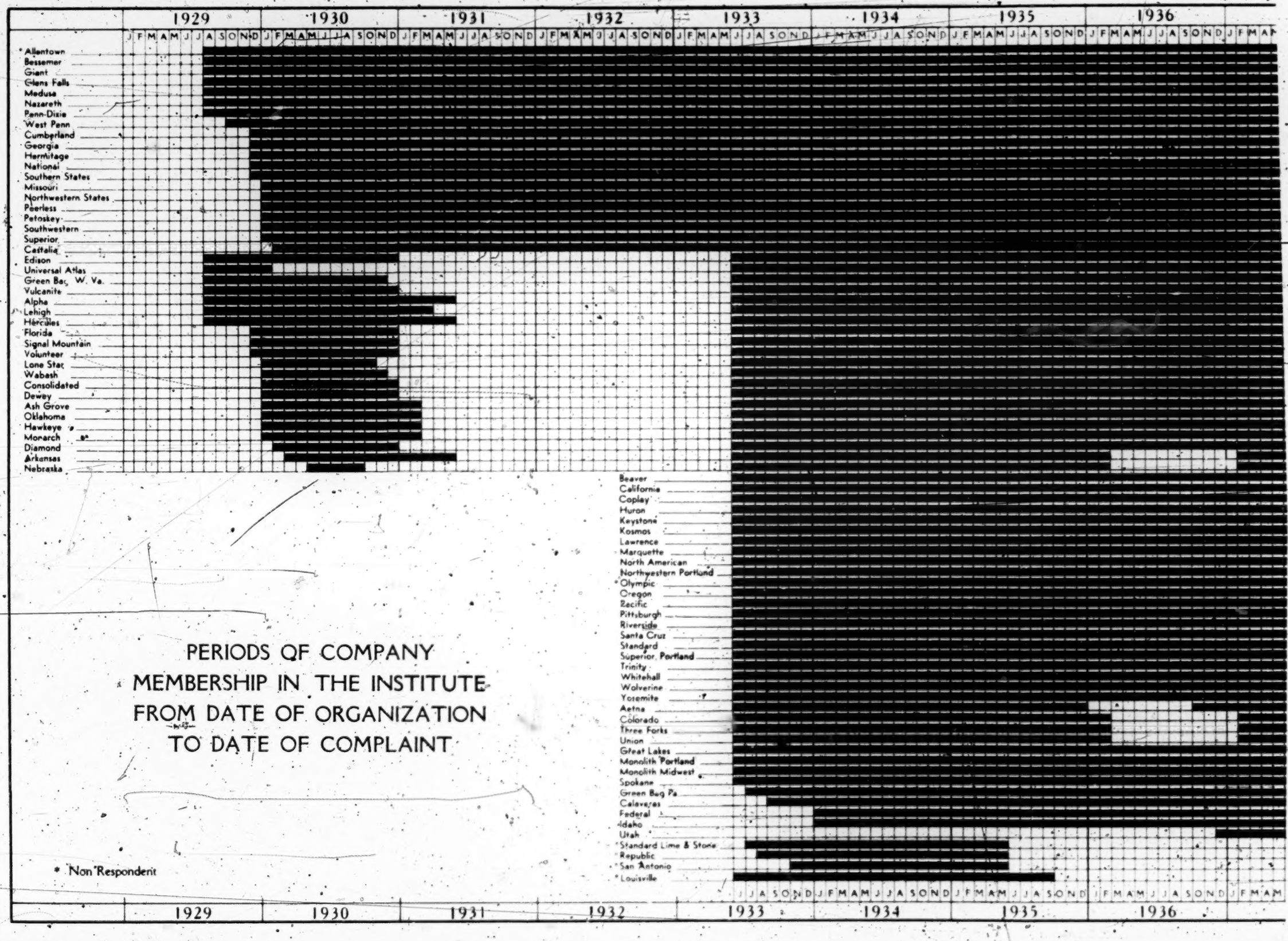


(c) The capacity of any individual plant is included only when the Institute services covered the state in which such plant is located.

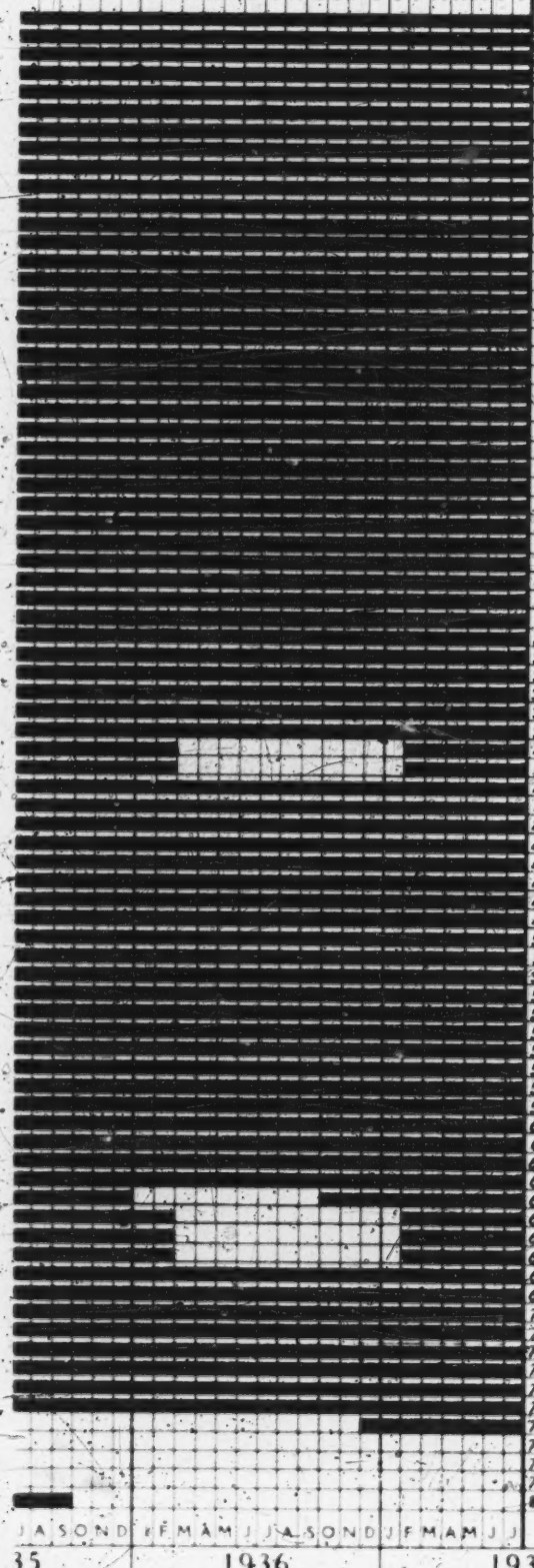
(d) Companies owning more than one plant are treated as one membership, but the several companies forming the Ideal & Cowham groups, are treated as a single membership, respectively.

The Wheeler Chart Co., N. Y.

PERIODS OF COMPANY MEMBERSHIP IN THE INSTITUTE FROM DATE OF ORGANIZATION TO DATE OF COMPLAINT



* Non-Respondent



		REFERENCES		
		COM. EX.	RESP. EX.	TRANSCRIPT
1	*Allentown	136 G, i	2155	
2	Bessemer	136 G, i-J	2155	
3	Giant	136 G, i	2155	
4	Glens Falls	136 G, H-i	2155	
5	Medusa	136 G, H-i	2155	11463
6	Nazareth	136 G, i	2155	
7	Penn-Dixie	136 G, i-J	2155	38465
8	West Penn	153 A	2155	27830-31
9	Cumberland	136 U-V	2155	39892
10	Georgia	136 U-V	2155	
11	Hermitage	136 U-V	2155	36333
12	National	136 U-V	2155	39538
13	Southern States	136 U-W	2155	
14	Missouri	136 AA-BB	2155	2825-26, 17141-42, 37218
15	Northwestern States	136 AA-BB	2155	36489
16	Peerless	136 AA-BB	2155	34795-96
17	Petoskey	136 AA-BB	2155	38767
18	Southwestern	136 AA-BB	2155	29152
19	Superior	136 AA-BB	2155	27604-05
20	Castalia	136 RR	2155	47674-75
21	Edison	136 G, i	2173 A-B	35539, 35800
22	Universal Atlas	136 G, i, J 136 NN	2173 A, C	34768-68, 34771-73, 35270-72
23	Green Bag, W. Va.	136 G, i	2173 A-B	29408
24	Vulcanite	136 A, E	2173 A, C	
25	Alpha	136 A	2173 A-B	23877, 23923
26	Lehigh	136 G, i-J 136 KKK	2173 A-B	26974, 27294-95
27	Hercules	136 A, E, 3144 B	2173 A-B	
28	Florida	136 U-V	2173 A-B	13369, 13371-72
29	Signal Mountain	136 U-V	2173 A, C	13369, 13371-72
30	Volunteer	136 U-W	2931 B-C	38649, 38652
31	Lone Star	136 AA, 140 A	2173 A-B	34565-67
32	Wabash	136 AA-BB, 606 A, H		
33	Consolidated	136 AA-BB	2173 A-B	13369, 13371-72
34	Dewey	136 AA-BB, 139 A	2173 A-B	46764-65, 46775-76
35	Ash Grove	136 AA-BB	2173 A-B	13581-82
36	Oklahoma	136 AA-BB	2173 A-C	
37	Hawkeye	136 AA-BB	2173 A-B, 3403 C	
38	Monarch	136 AA-BB	2173 A, C	42317-18
39	Diamond	136 RR	2173 A-B	
40	Arkansas	136 QQ, TT, 1033 C	2173 A, C, 127 C	
41	*Nebraska	1033 C	2173 A, C, 127 C	41961-62
42	Beaver		2173 A-B	
43	California		2173 A-B	42446-47
44	Coplay		2173 A-B	48099-100
45	Huron		2173 A-B	
46	Keystone		2173 A-B, 1367	27383
47	Kosmos		2173 A-B	36974
48	Lawrence		2173 A-B	31275-77
49	Marquette		2173 A, C	13967, 14065-66
50	North American		2173 A, C	33907-08
51	Northwestern Portland		2173 A, C	48116
52	*Olympic		2173 A, C	8523-24
53	Oregon		2173 A, C	8469-70
54	Pacific		2173 A, C	9133-34, 9166-68
55	Pittsburgh		2173 A, C, 2840	37723
56	Riverside		2173 A, C	42877
57	Santa Cruz		2173 A, C	8611
58	Standard		2173 A, C	
59	Superior, Portland		2173 A, C	42894-95
60	Trinity		2173 A, C	13369, 13371-72
61	Whitehall		2173 A, C, 1628	28520
62	Wolverine		2173 A, C, 2638, 2639	35922, 36022-23
63	Yosemite		2173 A, C	
64	Aetna	91, 92	2173 A-B, 2059	518-19, 1019-20, 30164
65	Colorado	1033 C	2173 A, C, 127 C	13844
66	Three Forks	1033 C	2173 A, C, 127 C	
67	Union*	1033 C	2173 A, C, 127 C	
68	Great Lakes	606 A, H		
69	Monolith Portland	606 A, H		
70	Monolith Midwest	606 A, H		
71	Spokane	606 A, H		47657-58
72	Green Bag Pa.	607 A, F-G		
73	Calaveras	611 A, D		
74	Federal	617 A, C		30713
75	Idaho	617 A, C		
76	Utah		127 C	
77	*Standard Lime & Stone	607 A, F-G	2139 B	
78	*Republic	609 A B		2810
79	*San Antonio	611 A, D		2810
80	*Louisville		2173 A-B	13220-21, 13281-83

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Hogan, President of Lone Star, testified in answer to the question as to what the attitude of the committee was concerning the necessity of having a code of ethics:

> "Well, some of them thought it was a very necessary part and I think all of them felt before we could get ready for a trade practice conference we would have to get part of The Cement Institute set up, but the important thing was to get the Federal Trade Conference—I am talking about our company—to get the industry to organize so that we could shape the thing up for a Trade Practice Conference."[6]

In addition to the possibility of securing a Trade Practice Conference, members of the industry interested in the formation of an association felt that some of the statistical work formerly done by the Cement Manufacturers' Protective Association, which had ceased to operate in January 1922, should be resumed, since the conduct of that association had been litigated and its activities held lawful by the United States Supreme Court.[7] These activities as stated in the Articles of that Association and set forth in the opinion of the Court were the collection and dissemination of information concerning (a) credits, (b) so-called specific job contracts, (c) freight rates on cement, and (d) statistics as to production, stocks of cement and clinker on hand, shipments and cloth sack returns.[8]

A trade practice agreement and the resumption of these services of information were the purposes animating the activities of the organizing committee and formed the basis of its invitation to cement companies to organize the Institute.[9]

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[6] Hogan, President, Lone Star (R) Tr. 34564.

[7] Coogan, Vice President, Alpha (R) Tr. 23878.
Hogan, *supra*, Tr. 34560-61.

[8] *Cement Manufacturers' Protective Association, et al.* v. *United States*, 268 U. S. 588, 591.

[9] Com. Ex. 136 B, E, H-I: Minutes of Organization Meetings, dated 8/13/29, 8/20/29.

2. Organization

a. Activities of organizing committee

It was first deemed necessary to ascertain what companies were willing to subscribe to the sort of program contemplated in order that action taken might be sufficiently representative of the cement industry.[1] The first act of the Organizing Committee was to engage counsel to guide it in organizing a trade association.[2] It was then necessary to determine upon the scope of the program proposed to be submitted for the approval of the industry. The Committee agreed at its first meeting that an association should be organized as rapidly as possible and collection and dissemination of statistical information undertaken and then a set of trade practice rules drafted as a basis for a trade practice conference with the Federal Trade Commission.[3] By August, 1929, the Committee had in hand a draft of Articles of Association and trade practice rules. It called a meeting of manufacturers in the eastern part of the United States to meet on August 13, 1929, in New York.

The first organization meeting was attended by representatives of nineteen cement producing companies.[4] The Chairman of the Organizing Committee and counsel outlined the purposes of the proposed association and the work that had been done by the Committee. Drafts of the Articles and the trade practice rules were distributed and read, clause by clause. Suggestions were made and accepted for revisions. Then a vote was taken on the advisability of forming an association. Representatives of

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[1] Bowen, Vice President, Lehigh (R) Tr. 27002.

[2] Hogan, President, Lone Star (R) Tr. 34562-63.

[3] Coogan, Vice President, Alpha (R) Tr. 23894.
Bowen, *supra*, Tr. 27002-03.
Hogan, *supra*, Tr. 34562-64.

[4] Com. Ex. 136 A-F: Organization Meeting Minutes, 8/13/29.

eleven companies voted in favor of the proposition without qualification. Representatives of seven of the other companies expressed themselves as personally in favor of it. The other representatives had left the meeting before the vote. The meeting thereupon adjourned.[5]

A second organization meeting was held on August 20, 1929, attended by representatives of fourteen companies. The Articles and the trade practice rules, entitled Code of Ethics as amended to meet the approved suggestions, were submitted. After discussion, the revised Articles and the Code of Ethics were passed around for signature and twelve companies signed, and thereupon The Cement Institute was declared organized and the Articles of Association declared operative.[6] Those signing the so-called Code of Ethics considered this document merely as a basis for a trade practice conference with the Federal Trade Commission.[7]

On October 4, 1929, the trustees issued instructions that steps be taken immediately to set in motion the proposed activities of the Institute as outlined in the Articles of Association, and engaged L. G. McConnell as Manager of The Cement Institute.[8] During the month of October, 1929, office space and equipment were acquired in New York City. At the trustees' meeting of October 29, 1929, the Manager of the Institute was instructed to prepare and arrange for publication of notices in the trade papers of the organization and purposes of the Institute, including a copy of the Code of Ethics.[9]

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[5] Com. Ex. 136: Organization Meeting Minutes, 8/13/29.

[6] Com. Ex. 136 G-J: Minutes of Second Organization Meeting, 8/20/29. See Chart X-A, *supra*, p. 1799, lines numbered 17, 21-27.

[7] Bowen, Vice President, Lehigh (R) Tr. 27002, 27298-99.

[8] Com. Ex. 136 K-M: Minutes of Trustees' Meeting, 10/4/29.

[9] Com. Ex. 136 R: Minutes of Trustees' Meeting, 10/29/29.

b. Organization by districts

In November 1929, all of the companies operating in the southeast expressed willingness to join after explanation by the Institute's counsel that the Articles and the Code of Ethics were believed to be such as would be approved by the Federal Trade Commission.[1] Volunteer conditioned its application upon the Federal Trade Commission's approval of the Code.[2] The south-eastern companies, eight in all,[3] were admitted to the Institute by mail ballot of its members announced at a meeting of its members on December 13, 1929.[4] In the meanwhile, the Articles of Association were amended to provide for additional vice presidents who should be members of the Board, and the trustees elected M. C. Monday, a representative of the southeastern companies, to a vice presidency.[5]

On January 7, 1930, the President of the Institute attended a meeting of midwest manufacturers in Chicago. After full discussion of the activities of the Institute, the meeting decided that further steps be taken to expand the activities of the Institute by establishing offices at Chicago and Kansas City for service to companies in those areas. The manufacturers present outlined the territories to be under the jurisdiction of each of the offices, with recommendations to the Board that the service of the Institute begin in each of the respective territories on February 1, 1930.[6] The manufacturers in the Chicago area recom-

[1] Resp. Ex. 2928 A-B: Minutes of Volunteer's Board of Directors, 11/23/29.

[2] Resp. Ex. 2928 A-B: Meeting of Volunteer's Board of Directors, 11/23/29.
Resp. Ex. 2929: Volunteer's application for membership, dated 11/23/29.

[3] Com. Ex. 136 V-W: Members' Meeting, dated 12/13/29. See Chart X-A, *supra*, p. 1799.

[4] Com. Ex. 136 U-V: Members' meeting, 12/13/29.

[5] Com. Ex. 136 S-T: Trustees' Meeting, 12/13/29.

[6] Com. Ex. 136 DD-GG: Trustees' Meeting, 1/24/30.

mended appointment of an Advisory Committee for each division or area group and that the Chairman of each such Committee be elected a vice president and member of the Board of Trustees of the Institute.[7]

On January 9, 1930 the Kansas City area manufacturers who had been present at the Chicago meeting, met in Kansas City and recommended the election of an Advisory Committee of seven for their area, the same conditions to apply.[8] Applications for membership in the Institute of these Chicago and Kansas City area companies, 21 in all (now 14 respondent companies), were submitted to the members of the Institute by mail ballot and their election was reported at the meeting of the Board on January 24, 1930.[9]

On January 24, 1930, the trustees again amended the Articles to provide for at least one and not more than six vice presidents, each to be *ex officio* a member of the Board of Trustees, in contemplation of a vice president as the representative of each area group. The title of "Manager" of the Institute was changed to "General Manager". The recommendations of the Chicago and Kansas City manufacturers as to advisory committees were adopted and committees appointed with membership[10] as suggested by the respective groups of manufacturers and each committee chairman was elected an Institute vice president.[11] The

[7] Com. Ex. 136 GG: Trustees' Meeting, 1/24/30.

[8] Com. Ex. 136 GG-II: Trustees' Meeting, 1/24/30.

[9] Com. Ex. 136 AA-BB: Trustees' Meeting, 1/24/30. See Chart X-A, *supra*, p. 1799.

[10] Com. Ex. 136 GG-JJ: Trustees' Meeting, 1/24/30.
Chicago Advisory Committee: C. A. Irvin (Ch.), J. B. John, W. J. Jennings, B. A. MacDonald and G. E. Pierson.
Kansas City Advisory Committee: J. A. Lehaney (Ch.), F. E. Tyler, H. Noreross, H. F. G. Wulf, C. H. Nichols, and P. Golson.

[11] Com. Ex. 136 AA-PP: Trustees' Meeting, 1/24/30.

Board instructed the General Manager to organize the operations of the Institute under four groups to be known as the Northeastern, Southeastern, Chicago and Kansas City Divisions respectively, each embracing the territory for which statistical data was to be separately reported in accordance with the regional interests of the manufacturers in different competitive areas. The Chicago office was placed in charge of G. H. Reiter as Manager of the Chicago Division.[12]

Prior to formation of the Institute, manufacturers in the Kansas City area had maintained an independent association known as the Kansas City Cement Bureau. These manufacturers met on January 9, 1930 and voted to discontinue the Bureau and recommended to the Board of the Institute that the assets and liabilities of this Bureau be transferred to, and assumed by, the Kansas City Division of The Cement Institute and that the fair value of its assets be applied to the payment of membership fees of the applicant companies. The Board of the Institute accepted these recommendations and they were put into effect as of February 1, 1930.[13]

B. D. McClain, Manager of the Kansas City Cement Bureau, was continued as Manager of the Kansas City Division.[14]

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[12] Com. Ex. 136 AA-PP: Trustees' Meeting, 1/24/30.
Com. Ex. 137 D, G-P: Reiter report to Chic. Div. members, dated 4/8/30.
Resp. Ex. 143 A-D: McConnell report to members, dated 11/1/30.
Reiter (C) Tr. 2797, 16687, 16707.

[13] Com. Ex. 136 AA-PP: Trustees' Meeting, 1/24/30.
Reiter, *supra*, Tr. 4515-16.

[14] Com. Ex. 1081 M: McClain to Senior, dated 1/31/30.
Com. Ex. 2226: McConnell to McClain, dated 1/30/30.
Resp. Ex. 143 A-D: McConnell report to members, dated 11/1/30.
Reiter, *supra*, Tr. 2806, 16707.
McClain, *supra*, Tr. 14398-99.

The New York office continued to function as the Institute's general office and also as the office for the Northeastern Division. It issued statistical information to members in the Northeastern Division and until April 8, 1930, to members in the Southeastern Division also.[15] Then the activities of the Southeastern Division were transferred to Chattanooga, Tennessee, pursuant to authorization by the Board on March 14, 1930.[16] The Southeastern Division office was put in charge of J. H. Dalbey.[17]

As of April 1930, the organization of the Institute was finally complete.[18] There were, however, within the areas organized a number of companies which had not joined.[19]

The witness Reiter testified that the activities of divisional offices "'were limited as all other activities by the Articles of Association'' and "were financed by special dues of members shipping into those districts, special dues being over and above general dues.''[20]

On May 26, 1930, the Board authorized the transfer of jurisdiction over that part of Louisiana lying west of the Mississippi from the Kansas City Division to the Southeastern Division, thereby giving the latter office jurisdiction over the entire State of Louisiana.[21] The witness Reiter testified that Texas was not included in any division, although the Institute had members there:

> "Because these divisions were self-organized by members of the industry who had mills within these

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[15] Resp. Ex. 143 A-D: McConnell report to members, dated 11/1/30.

[16] Com. Ex. 136 UU: Trustees' Meeting, 3/14/30.

[17] Reiter, General Manager, the Institute (C) Tr. 2807.

[18] Id., Tr. 16709-10.
Reiter, *supra*, testified that there has never been an Institute Division office on the West Coast, Tr. 16710.

[19] Findings, Par. 1.

[20] Reiter, *supra*, Tr. 16711.

[21] Com. Ex. 136 VV-WW: Trustees' Meeting, 5/26/30.

divisions to do special and additional work not covered by their general dues and the members in Texas did not elect to do any of these special activities.'"[22]

3. Membership

a. 1929-1933

The membership of the Institute rose from 14 companies in August 1929 to 40 companies by June 1, 1930, whose combined capacities amounted to approximately 55% of the total capacity in the United States and included 90 mills out of the total of 161 mills then in existence.[1] (See Charts X-A and X-B, *supra*, pages 1799, 1800.

At the first meeting of the Board of Trustees, on October 4, 1929, the advisability of applying for a F.T.C. Trade Practice Conference in response to the invitation extended by Commissioner Humphrey was discussed. It was decided to defer action until the actual membership of the Institute was more representative of the industry.[2] After the southeastern companies joined in December 1929, with the understanding that the Code of Ethics be approved by the F.T.C., the question of applying for a Trade Practice Conference was again discussed at a meeting of the members of the Institute on December 13, 1929. It was the sense of the meeting that the question be tabled until such time as the membership of the Institute was more representative.[3] Upon the admission of the 21 mid-western manufacturers (14 respondent companies), in January 1930, it was felt by certain members that the Institute was sufficiently representative to justify submission of the Code

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[22] Reiter, General Manager, the Institute (C) Tr. 2809.

[1] Com. Ex. 1: Map of United States showing location of cement plants, prepared from Bureau of Mines Year Book 1937.

Com. Ex. 143: Letter dated 11/1/30, McConnell, General Manager, the Institute, to members.

[2] Com. Ex. 136 K-M: Trustees' Meeting, 10/4/29.

[3] Com. Ex. 136 U-X: Members' Meeting, 12/13/29.

of Ethics to the F.T.C.[4] Thereafter some meetings between Federal Trade Commission and Cement Institute representatives were held.[5]

The fact that the Institute was negotiating for a Trade Practice Conference became known to the cement trade (other than manufacturers) generally, and suggestions of topics to be discussed at such conference were received and considered by the Institute.[6] However, no formal Trade Practice Conference ever materialized because members of the Institute handling the matter and their attorneys were not encouraged by the attitude of the Federal Trade Commission and the Department of Justice.[7] It developed as early as March 1930 that there was a difference of opinion between members of the F.T.C. and the Department of Justice which might make it inadvisable to press a formal Trade Practice Conference until the difference had been composed. The question of advisability was referred to counsel and early in September of 1930 it was decided, on counsel's advise, to defer action.[8]

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[4] Com. Ex. 136 AA-PP: Trustees' Meeting, 1/24/30.
Resp. Ex. 725: Letter dated 1/14/30, Brown, President, Alpha, to Smith, President, the Institute.
Resp. Ex. 726 A-B: Letter dated 1/27/30, Brown, President, Alpha, to Smith, President, the Institute.

[5] Coogan, Vice President, Alpha (R) Tr. 23890, 23892.

[6] Com. Ex. 149 A: Letter dated 2/8/30, Smith, President, the Institute, to Campbell, President, National Builders' Supply Association.
Com. Ex. 150: Letter dated 2/7/30, Campbell, *supra*, to Smith, *supra*.

[7] Coogan, *supra*, Tr. 23878.
Bowen, Vice President, Lehigh (R) Tr. 27002-03.
Hogan, President, Lone Star (R) Tr. 34565-66.

[8] Com. Ex. 136 QQ-UU: Trustees' Meeting, 3/14/30.
Com. Ex. 136 YY-DDD: Trustees' Meeting, 9/4/30.
Com. Ex. 604 A-B: Hogan, President, Lone Star, report dated 3/18/30 of Trustees' Meeting 3/14/30.
Hogan, *supra*, Tr. 34566-67.

As a result of the indefinite deferment of formal application to the Federal Trade Commission for a trade practice conference, resignations were sent in to the Institute, and the number of members declined from 40 as of September 1, 1930 to 28 as of January 1, 1931. The resigning companies no longer forwarded statistical data to the Institute.

Hogan, the President of Lone Star, in response to the question why Lone Star resigned in October 1930, replied:

> "Well, the thing—it was discouraging from the start. We were interested very strongly in the gathering of statistics that would be helpful in allowing us to lay principles for running our business, but it soon developed that there were some members out, or some of the members of the industry didn't join, so consequently, the statistics were not of much value.
>
> Hence, there were important facts and figures missing. The other thing was the Trade Practice Conference which we had been enthusiastic about as giving an opportunity to cooperate with the Government never developed; in fact, we were told, I think, along in August or July, somewheres around there, probably we couldn't get a Trade Practice Conference.
>
> We wouldn't have one. So the Institute began to dwindle away. Different members began dropping out and we dropped out in September of that year."[9]

This, together with the fact that business was dropping off and prices declining, led to additional resignations. By July 1931, the number of members had dropped to 20.

Lehigh, the oldest and one of the largest companies, resigned in March 1931 because it felt that the Institute no longer held any possibility for the execution of any of the purposes for which it had been formed, due to the resignation of a great many companies and because, in view of the

[9] (R) Tr. 34566-67; also Coogan, Vice President, Alpha (R) Tr. 23878, 23889.

low prices prevailing at the time, it desired to avoid all items of cost which it could.[10]

To Monarch, it looked as though the Institute was disintegrating and therefore it resigned to save an unprofitable expense.[11]

On May 12, 1931, the Board concluded that the statistical services which the Institute was then rendering were no longer representative of the industry and, consequently, of so little if any value to the members, that to minimize expenses the Board ordered the services discontinued entirely.[12] Divisional activities had already been terminated and Institute offices at Kansas City and Chattanooga closed. The Chicago office remained open until 1932, solely as an office for the Chicago Freight Rate Bureau, and then closed and moved to the New York office from which it continued to service rate books for the Chicago area until it returned to Chicago in 1933.[13] The New York office remained open and continued as a general office of the Institute.[14]

From May 1931 until June 1933, activities of the Institute were conducted by a skeleton organization of five persons and only 20 manufacturers continued as active members.[15] The only activity then conducted by the Institute was the freight rate service.[16]

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[10] Bowen, Vice President, Lehigh (R) Tr. 26974, 27002, 27294-95.

[11] Brooke, Vice President, Monarch (R.) Tr. 42317.

[12] Com. Ex. 136-3 K-3 L: Trustees' Meeting, 5/12/31.

[13] *Supra*, Part V, Sec. C 1.

[14] Reiter, former General Manager (C) Tr. 16729-30.
Resp. Ex. 126 A-D: Reiter's report to Chicago Division, dated 11/1/34.
McClain, Kansas City Division Manager (C) Tr. 14398.

[15] Reiter, *supra*, Tr. 16717.
Resp. Ex. 2155 A-B: Meeting of Members, 6/10/33.

[16] Reiter, *supra*, Tr. 16714-15.
MacFarland, Vice President, Medusa (C) Tr. 11465-66.

MacFarland, a Vice President of Medusa, who was President of the Institute between May 1931 and June 1933, testified that the Institute was quiescent except for the freight rate service. He could not recall any meetings of the Institute during this period or of the trustees, and his only duties were watching the financial situation of the Institute.[17]

The only letters sent by the Institute to its membership generally during that period had to do with legal service in connection with the Norris resolution for an investigation of the Cement Industry by the Federal Trade Commission and a questionnaire sent by the Commission to members of the industry.[18]

b. Under and during the influence of the National Industrial Recovery Act

In May 1933, the National Industrial Recovery bill was under consideration by the Administration, Congress and the people. The bill contemplated the formulation of an NRA Code for each particular industry to be undertaken by a trade association or group, and submitted to and approved by the President upon findings by him

> "(1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title. * * *" (Public Laws, No. 67, 1933, Title I, Sec. 3a).

The purposes of this legislation were stated in the Act itself, *inter alia*, "to provide for the general welfare by

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[17] (C) Tr. 11465-66; (R) Tr. 30870-74.

[18] Id., Tr. 30874-77.

promoting the organization of industry for the purpose of cooperative action among trade groups, * * * to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required) * * * and otherwise to rehabilitate industry and to conserve natural resources" (Sec 1).

At a meeting of the Portland Cement Association in May 1933, several manufacturers present deemed it advisable to meet with as many other manufacturers as possible to discuss the proper method of meeting the possible requirements of the NIRA. It was the unanimous opinion of those present that the Institute was the only available vehicle through which the industry could promptly and efficiently meet the requirements of any governmental authority created to carry into effect the proposed Federal legislation. It was also the sense of this meeting that the Institute's Articles of Association be so amended as to put the Institute in a position properly to represent the industry, and that a large percentage of the industry must be represented in the Institute. G. F. Coffin, who had remained a trustee of the Institute throughout its quiescent period, was selected to attend to the details of the Institute's resuscitation and reorganization.[1]

Coffin circularized the industry with letters dated May 19 and 20, 1933, summarizing action to date and asking manufacturers to send him their qualified applications for membership to be held by him personally until the Articles of Association had been so amended as to provide the necessary machinery for the proper presentation of the

[1] Reiter, former Secretary and General Manager of the Institute (C) Tr. 16714-15, 16719.

MacFarland, Vice President, Medusa (R) Tr. 30882-83.

Porter, President, North American (R) Tr. 34014-15.

industry's problems to government officials.[2] The form of application suggested provided that the application was to be acted upon

> "if and when the Articles of Association of the Institute are so amended as to permit the Institute to act for the industry at large, and to enable The Cement Institute to cooperate with the proper officials of the Federal Government in their desire to remedy and improve conditions as they affect our industry."[3]

Coffin and his Committee,[4] with the active assistance of counsel, undertook to draft such amendments to the Articles of Association as to meet all requirements of the pending legislation. The Committee consulted with various persons and received suggestions. It was the unanimous opinion of those consulted that the Institute should be nationwide with a nationwide major code of fair competition and that the various districts with differing trade practices should have direct representation in the management of the Institute, in this way safeguarding local interests. On May 29, 1933, Coffin sent copies of the draft of amended Articles to all members of the industry with the statement that immediately upon the Institute becoming representative of the industry by a sufficient number of joiners, the next essential step, namely, preparation of a Code of Fair Competition, would be undertaken.[5]

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[2] Resp. Ex. 2930 A: Coffin's letter to Volunteer. Similar copies of this circular (Resp. Exs. 1805, 1366).

[3] MacFarland, Vice President, Medusa (R) Tr. 30882-83, 30887-92. Resp. Ex. 2930 B: Form of suggested membership application.

[4] The membership of this Committee and who appointed it do not appear. The Committee is first mentioned in a general letter of May 29, 1933 from Coffin to the industry (Resp. Ex. 2169). MacFarland, *supra* (R) testified that Coffin was Chairman of a "revival" committee (Tr. 30919-20).

[5] MacFarland, *supra*, Tr. 30909-11; Resp. Exs. 2169, 2170 A-H.

Many companies promptly applied or re-applied for membership in the Institute subject to the qualifications stated in the application form sent by Coffin on May 19 and 20, 1933, including companies on the Pacific Coast that had theretofore never been members.[6]

"Have a Blue Eagle Up"

Many of the witnesses testified to some sense of compulsion in joining the Institute at this time for the purpose, not of protecting themselves against competition or the pressure of customers, but against the demands and regulations of the Government. Thus Scott, President of Keystone, testified:

> "Well, the NRA legislation was filling the papers; I think by that time it was an effective thing. General Johnson said you were not much of an American if you did not have a blue eagle up, and it was our impression at that time that unless you did function through the Trade Institute or trade association provided for that you could not share in Government business that might be coming out, and that was our reason for joining The Cement Institute."[7]

Elliott, the Vice President and acting general manager of Whitehall, testified that Whitehall understood that unless it was a member of some association, it would have no standing under the Code and, for that reason, it joined the Institute.[8]

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[6] Alpha, Calaveras, California, Dewey, Edison, Hawkeye, Keystone, Kosmos, Lawrence, Lone Star, Louisville, Marquette, Missouri, Monarch, Nebraska, North American, Northwestern Portland, Olympic, Oregon, Pacific, Pittsburgh P.G., Portland, Riverside, Santa Cruz, Southwestern, Spokane, Superior, Inc., Universal Atlas, Volunteer, Whitehall, Wolverine, Yosemite.

[7] (R) Tr. 27389.

[8] (R) Tr. 28525.

Hill, Vice President of Louisville, stated that when it was decided that the Institute would be the vehicle by which the provisions of the NRA should be carried out, Louisville joined because they wanted to cooperate in every way in carrying out the NRA, but shortly after the NRA went out, Louisville resigned.[9]

Wecker, President and Treasurer of Marquette, said his company joined unwillingly in 1933 in order to have a voice in the NRA Code. It conditioned its application for membership upon approval of the Articles and NRA Code by its counsel.[10]

In connection with the work of organizing the Institute on the Pacific Coast, C. L. Hogan and G. F. Coffin were appointed a committee to be known as the Pacific Coast Committee.[11] The Board directed that the officers proceed at once to start the work of the Institute as far as statistics and reports are concerned "to the degree and along the lines followed during 1929 and 1930."[12]

Articles Adopted to Meet Requirements of NIRA

At a special meeting of members on June 10, 1933 Article IV, Section 1 of the Articles of Association was amended to provide for a Board of Trustees consisting of nineteen persons who might or might not be associated with member companies; and Article VII was amended to provide that vacancies in the Board were to be filled by the president or until a successor should be duly elected or appointed. Thereupon, the president appointed thirteen trustees in accordance with this newly conferred authority

[9] (C) Tr. 13220-21.

[10] (C) Tr. 13969-71.
Com. Ex. 2603 A-F: Letter dated August 9, 1933, Marquette to Institute and member companies.

[11] Com. Ex. 606 G-H.

[12] Com. Ex. 606 J.

and the meeting adjourned until June 15, 1933.[13] At the adjourned meeting of members, new Articles of Association to supersede and take the place of the Articles then in force were unanimously adopted.[14] Immediately, the newly constituted Board of Trustees met and voted the election of forty-six companies[15] that had already made application subject to payment of the membership fee of $100[16] and telegraphed all industry members who had not as yet applied for membership, advising them that the Articles had been amended and urging that applications be forwarded immediately in order that Institute membership for the purpose of securing approval of an NRA Code be as nearly 100% of the industry as possible.[17] Between June 15, 1933 and December 7, 1933, the effective date of the NRA Cement Code, eleven more companies made application and were accepted,[18] and following the effective date of the code two additional companies were admitted to membership,[19] bringing the membership to its maximum of 79 out of a total of 85 manufacturers in the United States, whose productive capacity was approximately 98%[20] of the total productive capacity of the country.

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[13] Resp. Ex. 2155 A-D: Members' Minutes, 6/10/33.
Resp. Ex. 2172: Letter, MacFarland to Porter, dated 6/10/33; Com. Ex. 138 A-M: Articles of Association.

[14] Com. Ex. 596 B: Members' Minutes, 6/15/33.

[15] See Chart X-A, *supra*, p. 1799, lines numbered 21-29, 31, 33-67, 80.

[16] Resp. Ex. 2173 A-D: Trustees' Minutes, 6/15/33.

[17] Resp. Ex. 2931 A: Telegram dated June 15, 1933, Trustees to Hanahan, President, Volunteer.

[18] See Chart X-A, *supra*, p. 1799, lines numbered 30, 32, 68-73, 77-79.

[19] See Chart X-A, *supra*, p. 1799, lines numbered 74, 75.

[20] Includes the Texas and California mills of Southwestern which mills became members in June, 1933 (R) Tr. 39254, 47670; Resp. Ex. 1806.

In presenting the first draft of the Code to NRA the Institute stated:

[Italicized part quoted in Pdgs. Par. Seven (p)]

["*The Institute includes 96 percent in number and 98 percent of the producing capacity of all Portland Cement producers in the United States, and is authorized to represent the industry under the National Industrial Recovery Act, the policy and purposes of which are set out in Section 1, Title 1, thereof.*"][21]

c. Following the Schechter Decision until the issuance of the Complaint in this proceeding

On the date of the decision of the Supreme Court in the *Schechter* case Donald R. Richberg, Chairman of the National Recovery Board issued a press statement in which he said:

> "This decision of the Court makes codes of fair competition unenforceable as a matter of law * * *
>
> We face now the question of maintaining the gains which have been made in the last two years and retaining the values which have been created under the National Recovery Administration. It seems clear that that question must be decided by the administration and the Congress and the people of the United States within a very short time. * * *
>
> Therefore, pending the determination of this question, I hope that all employers heretofore operating under approved codes and all their employes will cooperate in maintaining those standards of fair competition in commercial and labor relations which have been written into the codes with practically universal sanction, and which represent a united effort to eliminate dishonest, fraudulent trade practices and unfair competition in overworking and underpaying labor."[1]

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[21] Com. Ex. 556, p. 1.

[1] Resp. Ex. 31 A-B: Reiter to members of the Industry, dated 6/11/35.

Statements of like nature were also made by other members of the administration, including the President and General Johnson, former administrator of NRA. The substance of all of these statements was that industries should adhere to the provisions of the unenforceable codes pending possible revision of the NIRA, or other legislation to provide new regulatory measures.[2] The Administration's attitude as so expressed induced Mr. Coffin, the President of the Institute to wire all members urging continued observance of all the provisions of the NRA Cement Code, especially of those provisions bearing upon hours of employment and wages.[3] Most of the members of the industry responded to this request. Several testified that they did so in the belief that the Administration desired it so and would shortly promulgate in some form a modified NIRA.[4] Wecker, President of Marquette, testified that his company, which had protested against provisions of the Code, remained in the Institute nevertheless because "there was a good deal of talk at that time of new codes, new regulatory measures by government, and so initially we stayed in The Cement Institute figuring that we were

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[2] The Institute: Reiter, General Manager (C) Tr. 17054-55, 17062-63, 17065.
Dewey: Moore, Vice President (R) Tr. 46950.
Hawkeye: Manley, General Manager (R) Tr. 41621.
Lehigh: Bowen, Vice President (R) Tr. 27004.
Monarch: Brooke, Vice President (R) Tr. 42320-21.
Southwestern: Warren, Vice President (R) Tr. 29211.
Universal Atlas: Affleck, President (R) Tr. 34979-80.
Volunteer: Hanahan, President (R) Tr. 38659.
Whitehall: Elliott, Vice President (R) Tr. 28703.

[3] Com. Ex. 320 E: Coffin to Coplay, 5/28/35.
Resp. Ex. 2932 A: Coffin to Volunteer, 5/28/35.
Reiter, *supra*, Tr. 17062-63.

[4] California: Duque, Vice President (R) Tr. 42446-47.
Dewey: Moore, *supra*, Tr. 46950.
Hawkeye: Manley, *supra*, Tr. 41621.
Lehigh: Bowen, *supra*, Tr. 27004.

in it and we would be in a position thereby to protect our interests should any such thing arise.'"[5] And Brooke, Vice President of Monarch, testified: "we thought it was the wish of the Administration at least from the press reports we had seen and information we had picked up, that it was the intention of the Administration to attempt a substitute for the NRA."[6]

An Executive Order fixed June 16, 1935 as the date upon which all Code Authority activities should cease. On June 10, 1935 the Board met for the stated purpose of clarifying the cement industry's position respecting the NRA Code. After considerable discussion a trade practice committee consisting of the members of the former Code Authority[7] was appointed "to carry on, as far as they legally can, the functions theretofore exercised by the Code Authority" pending new legislation.[8] The work of this committee is recited, *infra*, Sec. B 3, p. 1850 and *supra*, Part III, Sec. I, pp. 691-98.

At the same meeting the Board appointed Reiter, formerly Chairman of the Code Authority, as General Manager of the Institute, that office having been vacant since the resignation of McConnell in the early part of 1931.[9]

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[5] Wecker, President, Marquette (C) Tr. 14065-66.

[6] (R) Tr. 42321.

[7] Com. Ex. 623 A: G. H. Reiter, Chairman; F. M. Coogan, E. P. Lucas, J. F. Neylan, S. W. Storey, L. T. Sunderland, G. E. Warren.

[8] Com. Ex. 623 A-C: Trustees' Meeting, 6/10/35.
Resp. Ex. 127 A-D: Reiter report to Trustees, dated 12/10/36.
Reiter, General Manager, Institute (C) Tr. 2802, 4305, 17063-64.
Alpha: Coogan, Vice President (R) Tr. 23940.
Universal Atlas: Affleck, President (R) Tr. 34773-74.
Monarch: Brooke, Vice President (R) Tr. 42320-22.
Consolidated: Storey, President (R) Tr. 47574.
Lone Star: Neylan, Assistant General Sales Manager (C) Tr. 6171.

[9] Reiter, *supra*, Tr. 2806-07; Resp. Ex. 2154 A: Minutes of Meeting, March 19, 1931.

In spite of this Board action to retain the full membership of the Institute in anticipation of some form of future cooperation between the Federal Government and industry in respect of the maintenance of fair trade practices, three companies promptly resigned,[10] and a fourth resigned in September, 1935.[11]

CURTAILMENT OF ACTIVITIES

By December, 1935 the possibility of renewed activity in the field of fair trade practice agreements in conjunction with Government support or enforcement had virtually disappeared and the Board at its meeting on December 9, 1935, eliminated the Trade Practice Committee and limited the activities of the Institute to those of its statistical and freight rate bureaus, filing and checking contracts and general office activities including the Cement Information Bureau and the work of its existent Marketing Research Committee.[12]

The Board also adopted a budget for the year 1936 and provided that expenditures during the year 1936 be limited to the amounts set opposite each item of the budget and, further, that appropriations for all Committees and Bureaus, other than those necessary to carry out the functions to which the Institute was specifically limited and indicated on the budget, be discontinued, except the Marketing Research Committee which was under contractual obligations. In addition, the Board ordered that the general

[10] Reiter, General Manager, Institute (C) Tr. 2809-10. See Chart X-A, *supra*, p. 1799.

[11] Louisville: Hill, Vice President (C) Tr. 13220-21, 13283.

[12] Com. Ex. 624 B-G: Trustees' Meeting, 12/9/35.
Each of these activities is discussed under the appropriate heading, *infra*, Part XI, except Freight Rate Bureaus, see Part V.

office of the Institute be transferred from New York to Chicago[13] and this was done as of January 1, 1936.[14]

At a meeting of the Board on May 19, 1936, one year after the *Schechter* decision, the Chairman submitted the suggestion received from a member company that the Institute be dissolved, effective December 31, 1936. After discussion, action on the matter was set for the next meeting of members of the Institute.[15]

Dissolution Debated

On June 19, 1936 a special meeting of members was held and the issue of dissolution submitted. 48 manufacturers were represented, 17 of them by proxies. The minutes of that meeting recite that 25 members expressed themselves as being opposed to dissolution and 3 favored it.[16]

This meeting then resolved that the Board appoint a committee to study under advice of counsel the field of action open to the Institute to determine definitely the possibility of future usefulness of the organization.[17] A committee known as the Future Activities Committee, was so appointed[18] and reported to the Board on August 19, 1936.[19]

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[13] Com. Ex. 624 B-G: Trustees' Meeting, 12/9/35.

[14] Reiter, General Manager, Institute (C) Tr. 16937-38.
Resp. Ex. 127 B: Reiter's report to Trustees, dated 12/10/36.

[15] Com. Ex. 625 B; Resp. Ex. 127 B: Trustees' Meeting, 5/19/36.

[16] Com. Ex. 603 B-C.

[17] Com. Ex. 603 C-D; Resp. Ex. 2933 A: Members' Meeting, 6/19/36.
Reiter, *supra*, Tr. 16745.
Scott, President, Keystone (R) Tr. 27558-60.
Bates, Sales Manager, Federal (R) Tr. 30784-36.
Resp. Ex. 127 B.

[18] C. F. Conn, L. T. Sunderland, F. M. Coogan, H. M. Scott, B. H. Rader, were the members.

[19] Com. Ex. 634 N-T; Com. Ex. 595 A-F: Letter dated 7/10/36, Reiter to Conn, President, Giant.

FURTHER CURTAILMENT

On September 10, 1936, the Board met to consider the Committee's report and adopted the following recommendation:

"1. All activities of The Institute should be abandoned, except those specifically approved by the Trustees. This Committee recommends that the Trustees approve the continuation of the following activities:

A. Statistical service as now rendered by the Statistical Bureau under the immediate direction of Mr. Mallory. This contemplates continuing the compilation and distribution of statistics on production, shipments and stocks on hand in the customary manner until revised under the authority of the Trustees.

B. The compilation and distribution of freight rate information as at present conducted through the Traffic offices located in Chicago and Bethlehem, Pa.

C. Legal service of Institute Counsel.

D. General Manager's service.

E. A.A.A. Tax Committee.

F. Marketing Research Committee."

The Board also adopted Committee recommendations providing for the elimination of all district offices (not applicable to the Statistical or Traffic Bureau offices), retention of only such general office personnel and facilities as might be required for the efficient conduct of the approved activities, and the transfer of the general office of the Institute from Chicago to Washington.[20]

The recommendations of the Board were carried into effect by the General Manager. During September 1936, the Division offices of the Institute at Chicago, New York

[20] Com. Ex. 626 C-F: Trustees' Meeting, 9/10/36.
Com. Ex. 634 N-T: Committee Report.

and Kansas City were closed and by December 10, the general office of the Institute moved from Chicago to Washington, D. C. The statistical Bureau remained in New York and the rate bureau offices remained at Chicago and Bethlehem. As of January 1, 1937, the personnel of the Institute was reduced to a total of ten employees consisting of a manager and one clerk at each of the rate bureau offices, a statistician and one assistant at the office of the Statistical Bureau and a general manager and three employees at the general office of the Institute.[21] As of February 27, 1937 all but nine manufacturers of cement were members of the Institute.[22]

On July 2, 1937, the date of the commencement of this proceeding, the Institute had 76 members whose total annual shipment represented approximately 95% of the total shipments of manufacturers within the United States.[23]

B. The Institute's Documents.

This section confines itself to a digest of the Articles, the Code of Ethics and the use, if any, made of it, and the Compendium and the use and influence, if any, of its provisions throughout the industry.

Of these instruments of expression of the views of the industry, the Articles as revised in 1936 and the Compendium of Established Terms and Marketing Methods, published together in December 1935,[1] were the only instruments outstanding on July 2, 1937, the date of the commencement of this proceeding.

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[21] Reiter, General Manager, Institute (C) Tr. 16745-46; Resp. Ex. 127 A-C; General Manager's Report to Trustees, dated 12/10/36.

[22] Com. Ex. 1033 C: Reiter, General Manager, Institute, to members, 2/27/37; Hartley, Sales Manager, South Dakota State Cement plant (R) Tr. 41559-60.

[23] Com. Ex. 1033 D: *supra.*

[1] Com. Ex. 561.

1. The Articles of Association

a. As originally drawn

The Articles of Association as originally drawn and adopted August 30, 1929[1] contained fifteen Articles.

Article I declared the name of the Association to be The Cement Institute.

Article II described its purposes as follows:

[Italicized part quoted in Fdgs. Par. Thirteen (a)]

"To promote the best interests of the cement industry by providing facilities for collecting, through voluntary action, information with respect to trade and commerce therein, and disseminating such information among the members of the Institute and the public generally. The information, so collected and disseminated shall be as follows:

(a) Information concerning credits.

(b) *Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement.*

(c) Information concerning production and stocks on hand of clinker and Portland Cement and shipments of Portland Cement, and cloth sack returns.

[Italicized part quoted in Fdgs. Par. Seven (o)]

To collect and disseminate such other and further trade information as the Institute may determine upon from time to time in accordance with the provisions of these Articles of Association.

To adopt and promulgate a Code of Ethics for the government of the members.

To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable.

To adopt lawful plans for the general development and improvement of the industry."

[1] Com. Exs. 136 G-J, 138 A-M.

Reiter, General Manager of the Institute, testified that the purposes "were all expressed in this Article."[2]

Article III declared that any person, firm or corporation regularly engaged in the manufacture and sale of Portland cement is eligible to membership and entitled to one vote.

This provision was understood to admit to membership any manufacturer of Portland cement without regard to its ownership or interest in the market for the sale of cement. The only state-owned plant in the United States was invited to membership,[3] and while this plant did not join it subscribed to and received services of information issued by the Institute.[4] Applicants for membership were elected at any annual or special meeting or by mail ballot by a majority vote and admitted on signing the Articles of Association and the payment of a membership fee of $500 as prescribed in this Article.

Reiter testified that there were no conditions limiting membership other than those stated in Article III.[5]

Artice IV. Officers. The officers provided were a President, a Vice President, Treasurer and a Board of Trustees consisting of these officers and four other persons with provision that additional officers and trustees might be authorized by resolution of the Institute.

As the development of membership grew by district organizations, the Articles were amended to increase the number of the vice presidents from one to not more than three and subsequently to not more than six, all but one to be chosen as the Board might direct and the Board

[2] (C) Tr. 16688.

[3] Com. Ex. 634 E; Executive Committee Minutes, 7/6/33.

[4] Hartley, Sales Manager, So. Dakota (R) Tr. 41544-45, 41560-61.

[5] Reiter, *supra*, Tr. 16695.

elected to such vice-presidencies the individuals indicated as the choice of the districts from which they came.[6]

The Board was directed to appoint a "Manager" and fix his compensation. After organization by districts, this provision was amended to read "General Manager."[7]

ARTICLE V. POWERS AND DUTIES OF OFFICERS AND THE BOARD OF TRUSTEES. The President was declared an ex-officio member of all standing committees and required to call meetings of the Board upon the demand of a majority of the Board. The Vice President had no duties, except those of a trustee, save in the absence of the President. The Treasurer was required to keep an account of all monies received and expended and to render a financial statement when required by the Board. The manager was directed to act as Secretary of the Institute and of the Board, to keep records of meetings, collect membership fees, dues and assessments and pay them over to the Treasurer and prepare a semi-annual report of the activities and condition of the Institute and perform other duties required of him by the Board.

The Board was authorized to hold meetings at such times and places as it deemed proper, to appoint committees and employ counsel, to carry into effect the measures and purposes provided in the Articles and to devise other measures not in conflict with the Articles or the law of the land to promote the objects of the Institute. But the Board was forbidden to "undertake to carry into effect any such other measure or measures without having first secured the approval of two-thirds of the members of the Institute pursuant to the provisions of these Articles". The Board was granted power to make by-laws for the conduct of its own business and the business of the Institute,

[6] Com. Ex. 136 L, V and S-T, LL, CC, DD, QQ-RR; Resp. Ex. 2154 A-B: Minutes of Trustees.

[7] Com. Ex. 136 DD: *supra*.

to levy dues and assessments *pro rata* on the basis of shipments of cement during the preceding calendar year into the territory covered by the activities of the Institute.

ARTICLE VI. ELECTION OF OFFICERS. Officers and trustees were to be elected for one year by ballot at the annual meeting of the Institute by a majority vote, except that all vice-presidents, save one, might be elected from time to time as determined by the Board of Trustees. Such vice-presidents were also members of the Board.

ARTICLE VII. VACANCIES. The trustees were authorized to fill any vacancy for the unexpired term.

ARTICLE VIII. MEETINGS. The annual meeting was set on the second Tuesday in November and provision was made for special meetings of the Institute. Meetings of the Board were authorized on the call of the President or a majority of the Board at the time and place fixed in the notice thereof. The President was authorized, if he deemed it inexpedient to call a meeting of the Board or the Institute, to request a vote by mail on any question, and the vote so rendered was to have the same force and effect as if given at a meeting.

ARTICLE IX. QUORUM. A majority of the members of the Institute and four members of the Board of Trustees were authorized as a quorum of the Institute and the Board, respectively.

ARTICLE X. SALARIES. Officers and trustees were to serve without compensation. The General Manager's compensation was to be fixed by the Board.

ARTICLE XI. OBLIGATIONS OF MEMBERS.

"Members of the Institute shall pay all dues and assessments, as provided in these Articles and as

fixed by the Board of Trustees, and if any member neglects to do so for the period of sixty (60) days after the same are due and payable, then such member shall automatically cease to be a member of the Institute; provided, however, that such member shall be liable for the payment of all dues at the rate of and on the basis in effect at the date of his ceasing to be a member, for a period of twelve months from such date; provided, however, that such member may be reinstated by a majority vote of the Institute upon payment of all his indebtedness to the Institute."

ARTICLE XII. DURATION. The life of the Institute was fixed to continue until terminated or suspended upon the request in writing of two-thirds of the then members, provided such members had at the time paid all dues and assessments owing from them. Any member was declared entitled to withdraw upon notice in writing to the General Manager and by paying all dues for a period of twelve months succeeding the date of resignation at the rates prevailing on the date of resignation.

ARTICLE XIII. AMENDMENTS. The Articles provided for their own amendment at any annual or special meeting of the Institute by the affirmative vote of two-thirds of all members, provided no amendment should be in violation of, or in conflict with, any law of the land, and members should have ten days prior notice of any amendment to be proposed at the meeting.

ARTICLE XIV. COLLECTION AND DISTRIBUTION OF STATISTICAL INFORMATION. This article provided in considerable detail the statistical information to be collected by the Institute and the conditions under which it was to be distributed by the Institute.

Section 1. Credit information: considered in detail, Part XI A, *infra*, p. 1875.

Section 2. Specific job contracts: considered in detail, Part XI B, *infra*, p. 1878.

Section 3. Statistical information: considered in detail, Part XI C, *infra*, p. 1927.

Section 4 prescribed that "All of the foregoing statistical reports shall be made upon blank forms approved by the Board of Trustees and shall relate wholly to past transactions."

Section 5 required the General Manager to compile the information received in convenient form on blanks provided for that purpose for distribution to the members and the public.

Section 6 provided that information other than credit information specifically requested by any member "shall be given to all members at the same time, and no advance reports shall be given to any member."

Section 7 provided that compilations of information given to members generally "shall also become available to the public at the office of the Institute and through such other agencies as the Board of Trustees may, from time to time, determine and authorize."

Section 8 authorized the Board to furnish information collected by the Institute to the public through such agencies as it may consider advisable.

Section 9 required that all communications between the Institute and members, unless otherwise provided in the by-laws, relating to the collection and distribution of statistical information, shall be on blank forms of uniform character to be provided for such purpose and shall relate only to the objects of the Institute specified in its Constitution [*sic* Articles], and then provided "No information or data, whatever, other than that thus provided on said forms, shall be collected or distributed by the Institute."

Section 10 forbade the distribution of information received from any member in such form as to identify the source thereof without the permission of the members giving the information; provided, however, that where it appears that two or more manufacturers have entered into specific job contracts for cement involved in the same work, the manager shall name the manufacturers holding such contracts to those directly interested. See *infra*, Part XI B, p. 1878.

Article XV, On organization, declared that the Articles shall be considered operative upon the authorized signatures of no less than twelve persons, firms or corporations regularly engaged in the manufacture and sale of Portland cement.

b. As amended to meet the requirements of a Trade Association under the NIRA

In response to the sentiment of the industry that the Institute should be the vehicle to negotiate a Code of Fair Practice under the NIRA,[1] the Institute held a special meeting in New York on June 10, 1933, all members present. This meeting voted an amendment to the Articles increasing the Trustees to nineteen and authorizing the President to fill any vacancy. The President thereupon appointed 13 gentlemen, to fill the vacancies thus created.[2]

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[1] Reiter, General Manager, Institute (C) Tr. 16719.

[2] Com. Ex. 596 C: The newly appointed trustees were B. F. Affleck, President of Universal Atlas, Joseph Young, President of Lehigh, John B. John, President of Medusa, G. S. Brown, President of Alpha, H. Struckmann, President of International, J. C. Senior, President of Trinity, B. S. Smith, President of Penn-Dixie, L. T. Sunderland, President of Ash Grove, C. B. Condon, Vice President of Hawkeye, B. H. Rader, Vice President of Lehigh, H. D. Raff, Vice President of Diamond, J. J. Porter, President of North American and F. H. Smith, President of Lawrence. Mr. Senior, of Trinity, declined to serve and S. W. Storey, President of Consolidated, took his place. Resp. Ex. 2155 A-D: Minutes of Members' Meeting, 6/10/33.

The newly constituted Board, working with the assistance of counsel, then prepared a general revision of the Articles in order to make them responsive to the purposes and requirements of the NIRA. The revised Articles were submitted to a special meeting of the Institute convened on June 15, all members present, and read Article by Article. By resolution duly presented the proposed new Articles of Association were unanimously approved and declared the Articles of the Institute.[3]

The significant changes effected by this revision were: a declaration of the purpose to conduct the affairs of the Cement Institute under the terms of any applicable federal and state statute; reduction of the membership fee to $100; provision for a trustee and his alternate to be elected in each of the twelve Bureau of Mines districts and seven trustees to be elected at large by the district trustees; a president and vice president and treasurer to be elected by the entire membership and other vice presidents, a secretary, and other officers created by the trustees to be elected by them; authorization of the Board of Trustees to prepare and adopt codes of fair practice or fair competition if such were authorized by law, and subject to approval by the appropriate governmental agency; and further the Board was authorized "to take all proper steps in the enforcement thereof, and in general, to have full and complete power and authority to represent the cement industry in its relations with any such governmental agency in all matters growing out of any such legislation"; and further the Board of Trustees was specifically forbidden to impose any inequitable restrictions on admission to membership.

The only enforcement provision in the Articles was then stated as follows:

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[3] Com. Ex. 596 A-B.
Resp. Ex. 2170 A-H: Articles of Association. (Handwriting notations on this exhibit were not offered, Tr. 30911.)

"Any member may be suspended or expelled for cause for the violation of any of the provisions of these Articles of Association or of any code of trade practices or fair competition subscribed to by the industry and approved by any duly authorized governmental agency, but any such suspension or expulsion shall be only by a two-thirds vote of the Board of Trustees and after the member shall have been furnished a full statement of the charges against him and been provided adequate opportunity for a hearing thereon."

Subsequent Amendments to the Revised Articles

Approval of the NRA Cement Code in 1933 was predicated upon findings by the Administrator that the applicant group—that is, The Cement Institute—imposed no inequitable restrictions on admission to membership and was truly representative of the Industry. Nevertheless, a request of the Deputy Administrator, W. A. Janssen, that the Articles be amended to permit all members of the Industry in a given district, whether members of the Institute or not, to attend and vote at District Meetings for the election of District Trustees was referred by the trustees to the district meetings for consideration.[4] Reiter testified that the change was made.[5] In effect this gave a voice in the selection of representatives to six[6] members of the Industry who had not become members of the Institute.

Representative Character of the Board

In representation the twelve District Trustees have always been associated with small companies and the seven Trustees at Large have usually been associated with the larger companies.[7] Each member of the Board has al-

[4] Com. Ex. 622 L: Trustees' Meeting, 2/14/35.

[5] Reiter, General Manager, Institute (C) Tr. 16722-24.

[6] Cowell, Ford, National, P. C. of Utah, Washington—Idaho and South Dakota.

[7] Scott, President, Keystone (R) Tr. 27556.
Alexander, President, Missouri (R) Tr. 37220-21.

ways had authority equal to that of any other member and each has always been entitled to one vote.[8] The Board has never had authority, and has never undertaken, to enlarge upon the functions stated in the Articles of Association.[9]

c. As amended after the Schechter decision

At a meeting of the Institute held in Chicago on December 11, 1935[1] the membership unanimously adopted amendments to the Articles authorizing voting only by members, and providing that any trustee elected to represent any cement district may be recalled by a majority vote of the members in his district in the event of a change in his status or if, for any other reason, he is not considered to be representative of the members in such district and in the event of such recall, his district may elect by a majority vote a trustee to fill the unexpired term; and granting the trustees like power in respect of any trustee at large. Provision was made for the annual meeting upon the call of the Board of Trustees and members suspended or expelled were declared subject to the payment of dues required of members who resign.[2]

This revision also eliminated the right of representation by members of the Industry not members of the Institute.

[Italicised part quoted in Fdgs. Par. Seven (q)]

The purpose as originally stated "To adopt and promulgate a Code of Ethics for the government of the members" was stated in this revision "*To adopt and prom-*

[8] Reiter, *supra*, Tr. 16719-20.
Affleck, President, Universal Atlas (C) Tr. 13049.

[9] Scott, *supra*, Tr. 27551.

[1] Com. Ex. 600 A-C.

[2] Com. Ex. 561: Articles of Association.

ulgate a Code of Fair Competition for the government of the industry".[3]

The Articles otherwise remained as revised in 1933.

2. The Institute Code of Ethics

The Code of Ethics, drafted under advice of counsel by the Organizing Committee in 1929,[1] was signed by representatives of the twelve companies originally organizing the Institute.

The Code of Ethics was drafted and signed for the purpose, and with the expectation, of its submission to the Federal Trade Commission as the basis of a trade practice conference, in conformity with the suggestion made by Mr. W. E. Humphrey, a member of the Federal Trade Commission, before a meeting of the manufacturers of cement held in May, 1929.[2]

The Code verbatim follows:[3]

THE CEMENT INSTITUTE

Code of Ethics

The Portland Cement Industry fills an important and necessary place in the country's economic structure. It owes a duty to the public and also to its own stockholders. This duty includes the obligation to deal fairly with labor, to manufacture its product efficiently, to promote its proper use, and, as far as possible, to prevent its improper use, to eliminate waste, to sell at a fair price, to develop new uses, to approve and encourage sound and fair trade practices in business and to condemn and prevent bad and unfair practices. To that end competition should be open and constructive, not secret and destructive.

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[3] Com. Ex. 561, p. 5.

[1] Com. Ex. 136 B.

[2] Hogan, President, Lone Star (R) Tr. 34560-61; *supra*, p. 1798.

[3] Com. Ex. 138 N-U.

With these purposes in mind, the undersigned manufacturers of Portland Cement have compiled, in a concise and understandable form, the following rules and regulations into this Code of Ethics, and hereby agree to be bound thereby.

I.

Standardization of Product

Due largely to the activity of the Bureau of Standards and other Bureaus of the United States Government, the benefit to all concerned, of standardization, is generally recognized. Portland Cement was one of the first important commodities for which a generally accepted standard specification was developed and today practically all Portland Cement is manufactured, sold and used, under the uniform Standard Specifications of the United States Government, the American Society for Testing Materials, and the American Standards Association.

Freak and unreasonable specifications increase costs not only of manufacturer but of dealer and user as well; they also tend to destroy confidence in a standard specification, and, not being in the public interest, should be discouraged.

Therefore, it is declared that all Portland Cement manufactured and sold shall be guaranteed to meet the existing standard specifications of the American Society for Testing Materials, the American Standards Association, and the United States Government Master Specifications; that cement manufacturers shall not be responsible for the improper use of cement, and therefore shall not guarantee finished work.

Failure of any manufacturer to observe these declarations shall be considered an unfair trade practice.

It is, of course, the privilege, and in some cases the custom of purchasers or users to make sure that the guarantee of manufacturers is fulfilled by employing commercial testing laboratories to sample and test cement; arrangements for the service and the charge therefor, are

made between the laboratories and the cement purchasers or users, and for any manufacturer to pay or absorb such charges, directly or indirectly, shall be considered an unfair trade practice, unless at the same time the manufacturer shall publicly offer to pay or absorb such charges for all purchasers or users.

II.

Standardization of Sales Contract

The making of incomplete, ambiguous and deceptive contracts for the sale of Portland Cement provides a medium for making unfair price discriminations, induces fraud and repudiation of such contracts, gives rise to disputes, and disturbs stability in business operation, to the consequent injury of the industry and the general public.

Therefore, it is declared, that all contracts for the sale of Portland Cement shall contain a definite statement of price, quantity, terms of payment, time and place of delivery and all other items necessary to form a complete contract; further, that all contracts so entered into shall be performed in letter and in spirit.

The industry hereby records its approval of the practice of manufacturers in establishing definite terms of sale, and adhering thereto, and the continued violation by a manufacturer of its terms for the purpose or with the effect of price discrimination is condemned.

[Italicized part quoted in Fdgs. Par. Seven (o)]

It is further declared, that it is desirable that a standard form of sales contract be drafted and adopted for the use of the Portland Cement Industry.

III.

Price Discrimination

The practice of manufacturers' quoting different prices at the same time to purchasers or users similarly situated is unfair to purchasers or users and to competing manufacturers.

Therefore, it is declared, that no discrimination shall be made in price, or terms and conditions of sale, as between purchasers or users in the same class except as provided by the Clayton Act.

It is further declared, that in order to carry out the above declaration, each manufacturer shall, especially when changes in its prices and terms or conditions of sale occur, make its prices and all terms and conditions of sale public by broadcast quotations to the trade so that interested members of the trade and buying public may at all times have accurate information.

IV.

Secret Rebates and Price Concessions

The payment or allowance of secret rebates, refunds, credits, or unearned discounts, etc., tends to demoralize both the buyers and sellers of cement and to promote dishonest and unfair competition.

Therefore, it is declared, that no manufacturer shall pay or allow any secret rebate, refund, credit, or unearned discount, whether in the form of money, or otherwise; nor shall any manufacturer extend to particular purchasers or users special services or privileges not extended at the same time to all purchasers or users similarly situated; nor shall any of these practices be carried out directly or indirectly by the manipulation of accounts or records so as to cover up actual conditions.

In order to carry out the principle stated above, the following specific matters, in addition to the above statement, shall be regarded as secret rebates and price concessions.

1. The sale by any manufacturer of any commodity, other than cement, manufactured or handled by such manufacturer at a discriminatory price for the purpose, or with the effect, directly or indirectly, of furthering the sale of a particular brand of cement.

2. The purchase, by any manufacturer, of bonds, or other securities, issued for the financing of construction work, either in the name of the manufacturer, or its subsidiaries, or of individuals, or officers, connected therewith, for the purpose, or with the effect, of influencing the sale or use of a particular brand of cement, or the acceptance of such bonds, or other securities, in payment, wholly or in part, for cement.

3. The purchase, by any manufacturer, of fuel, or other supplies, either in the name of the company, or its subsidiaries, or of individuals, or officers connected therewith, at premium prices above the fair market price of such commodities at the time of purchase for the purpose, or with the effect, of influencing the sale or use of a particular brand of cement.

4. Lavish, excessive or undignified entertainment of purchasers or users of cement, or others concerned therewith, with the intent to influence the purchase or use of a particular brand of cement, provided that moderate and dignified entertainment shall be permitted, such for example as is incident to the conducting of cement purchasers or users, and others, through cement manufacturers plants.

5. Donating funds, or providing banquets or other similar lavish entertainments for purchasers or users, or associations thereof, to influence the purchase of a particular brand of cement.

6. Giving, or offering to give, premiums, personal gifts, gifts of cement, or gifts of any other commodity of substantial value to purchasers or users of cement with the intent or effect of influencing the purchase of cement. Provided, however, that nothing herein contained shall prevent any manufacturer from conducting a *bona fide* advertising campaign involving the presentation to purchasers or users, of commodities of moderate value bearing the name of the donor thereon.

7. Payment, or offer to pay, directly or indirectly, any advertising expenses of purchasers or users of cement, unless at the same time the same, or a similar payment, or offer, is made to all other purchasers or users in substantially the same circumstances.

8. The omission from or inclusion in an invoice of any fact, or facts, which make it a false record, in whole or in part, of the transaction represented on the face thereof, including the invoicing of a less quantity than the actual amount, the antedating or post-dating of the invoice, the refunding of any amount to purchasers or users, unless it is clearly shown for what reason such refund is made, and that such refund is legitimate.

9. The sale of cement below cost, for the purpose, or with the effect, of injuring a competitor, or of lessening competition, except that cement may be sold below cost to meet competitive market price.

10. The prepayment of railroad freight charges on shipments consigned to other than the cement manufacturer itself, except in the case of freight charges to railroad stations to which railroad regulations require prepayment from any mill, or the payment of railroad demurrage charges by any manufacturer, with the purpose or effect of giving or granting to any particular purchasers or users a special privilege, rebate or concession, not offered to all other purchasers or users under substantially the same circumstances, is an unfair trade practice.

11. The payment or allowance, by any manufacturer, of freight charges to purchasers or users, by any means whatsoever, of an amount in excess of the actual amount provided by transportation company's published tariff rates, is an unfair trade practice.

12. The payment, credit or allowance, by any means whatsoever, by any manufacturer for more, or less, cloth

sacks returned by purchasers or users than such purchasers or users are actually entitled to credit or allowance for under the manufacturer's published terms and conditions of sale is an unfair trade practice; and the purchase, payment or allowance, by any means whatsoever, by any manufacturer, for damaged sacks which are not in serviceable condition, or which a reasonable amount of repair will not put in serviceable condition for further use as cement containers, or the purchase, payment or allowance, by any means whatsoever, for sacks bearing other than a manufacturer's own brand, when to do so is different from or contrary to the terms and conditions of sale of any such manufacturer, is an unfair trade practice.

13. The failure of any manufacturer to charge and to require purchaser or user to pay the manufacturer's published charges covering cloth sacks and paper bags is an unfair trade practice.

[Italicized part quoted in Fdgs. Par. Twelve (b)]

14. *For manufacturers to divert, or to permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is discriminatory as between purchasers or users, and is therefore an unfair trade practice.*

V.

Other Unfair Trade Practices

Many unfair and reprehensible trade practices have sprung up, from time to time, in the cement industry. It is the earnest desire of the industry to eradicate these practices in order that the cement business may be conducted honestly, openly and fairly.

Therefore, it is declared, that the following specific trade practices are unfair and are hereby condemned:

1. The willful interference, by any means or device whatsoever, with any existing sales contract between a manufacturer and its customer, with the purpose, or effect, of inducing, or causing a breach of such contract. Whenever notice of the existence of a contract is brought to the attention of any manufacturer, or his representative, he shall promptly discontinue all efforts which might induce a contracting party to break such contract.

2. The defamation or disparagement of a competitor by words or acts which untruthfully call in question his business integrity, his ability to perform his contracts, his credit standing, or the grade, quality, count or weight of his products.

3. The enticement of the employees of a competitor with the intent or effect of interfering with the conduct of the business of such competitor.

4. The making, causing or permitting to be made or published any false, untrue or misleading statement by way of advertisement or otherwise concerning trade, quality, character, nature, origin, manufacture or preparation of products is an unfair trade practice.

VI.

Definitions

The term "cost" when used in this Code of Ethics shall be interpreted to include, among other items the folllowing: Cost of raw materials, transportation thereof, manufacture, packing and loading and sack losses, depreciation, depletion, obsolescence, selling and administrative expenses, fair return on total invested capital.

The term "purchasers or users", when used in this Code of Ethics, shall be interpreted to include both actual

and prospective purchasers or users, as follows: dealers, architects, engineers, contractors, concrete products plants, railroads, central mixing plants, United States, state, county and Municipal Governments, including regularly constituted Boards and Commissions thereof, commercial, industrial and manufacturing concerns, public officials, public utilities, etc.

The term "sales contract" as used in Article V, Section 1, shall be understood to be any *bona fide* agreement in writing between manufacturer and purchaser or user, covering the purchase and sale of cement, containing a definite statement of price, quantity, terms of payment, time and place of delivery and all other items necessary to form a complete and unambiguous contract.

VII.

Violations of This Code of Ethics

The violation of any of the above rules or declarations or any of the provisions of this Code of Ethics shall be deemed to be an unfair method of competition.

Operations Under The Code of Ethics

No trade practice conference was ever held.[4]

Reiter, Manager of the Chicago Division between 1930 and 1931 and General Manager of the Institute from June 1935 until after the commencement of this proceeding, testified:

> "Q. Mr. Reiter, during the period you were connected with the Institute were there any activities in your experience taken in the form of force or policing of provisions provided for in the code of ethics? A. None whatever."[5]

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[4] *Supra*, pp. 1808-09.

[5] (C) Tr. 16699.

On March 21, 1930 the general manager wrote National that the Institute had received information that one of National's salesmen, declining to make an exception to the company's usual conditions and terms of sale, had made the statement to his prospective customer that his company could not make such concession "because The Cement Institute won't let you". The letter protested that while the Institute believes that the conduct of business contrary to the Code is also contrary to good business policies and to the law, the statement of National's salesman might convey a wrong impression and lead to the inference that there was something improper in the Institute. The letter said:

> "We cannot have imputed to The Institute something that is not there.
>
> The Institute is relying on the good faith of each individual member to abide by the Code of Ethics, but so far has set up no machinery for enforcing the Code."[6]

A copy of the substance of this letter was sent to all members of the Institute together with a request that representatives of the companies who had been furnished with copies of the Code of Ethics be advised accordingly and thoroughly instructed as to the functions of the Institute.[7]

On September 11, 1930 the Institute addressed all its members concerning a complaint that some of them were accepting interest bearing notes or trade acceptances in payment of invoices and allowing a cash discount on such notes or acceptances of tender. The communication stated that these practices were, in the opinion of the trustees, a violation of Article IV of the Code of Ethics. Another communication sent to all members stated that there was a growing practice by some members of granting secret rebates, refunds, credits or unearned discounts in violation

[6] Com. Exs. 146, 136 SS, 148.

[7] Com. Ex. 1041 A.

of the terms of written contracts for the sale of cement; and that these were in violation of Article II of the Code. The violated sections of the Code were set forth in the communications and drawn specifically to the attention of all members.[8] No punishment or threat of punishment was suggested.

On September 13, 1930 the general manager addressed all members of the Institute referring to a complaint that some members had been making contributions of cement and other materials to purchasers and stating that the Board of Trustees regarded this as a violation of Section 6, Article IV of the Code. After setting forth the section in question, the communication closed with the observation: "This memorandum is sent you by order of the Board of Trustees."[9]

The general manager reported to all members on November 20, 1930 that a meeting of the trustees on November 11[10] directed a procedure for the investigation of reported violations of the Code. The letter enclosed a brief summary of procedure with a complete set of forms and the letter declared the procedure to be in immediate effect.[11]

Coogan, Vice President of Alpha, testified that Alpha never signed the Code of Ethics and that no machinery was set up for enforcing it.[12] The witness believed that at one time forms were prepared for reporting violations, and that in several cases forms were sent out asking for information about things which had been done, alleged to be or which might have been violations, but that these forms were not intended to provide any method of enforcing the

[8] Com. Exs. 1041 B, 2824.

[9] Com. Ex. 2824.

[10] Com. Ex. 136-3 F-G: Trustees' Minutes, 11/11/30.

[11] Com. Ex. 153 GG.

[12] (R) Tr. 23894-98.

Code.[13] The witness identified a letter addressed to the president of Alpha by the general manager of the Institute on November 24, 1930 stating that the Institute had received a report that Alpha prepaid freight on shipments consigned to a particular customer in Elberon, N. J. and asking for an accurate report on this matter.[14] Alpha replied that they did prepay freight to Elberon, N. J. for the account of a dealer at Long Branch, N. J. and prepaid the freight because "the dealer had no representative at the delivery point to take care of this. We considered it simply a matter of common sense to prepay the freight."[15] The matter was so reported to a member of the Institute by the General Manager[16] and was not heard of again.

Coogan testified to the purpose and meaning of the Code of Ethics:

> "Q. —do you consider that Code to represent an agreement among competitors? A. No, sir; I do not.
>
> Q. Even though it was signed? A. It was never signed by our company.
>
> Q. Yes, but you know it was signed by others? A. I knew it was signed by some companies, yes.
>
> Q. Do you think it is dependent on whether it was signed or not, as to whether it was an agreement? A. No, I think the purpose for which that Code of Ethics was prepared was entirely legitimate, and did not necessarily constitute an agreement. I think, again, that it stated what were considered the best practices in the hopes that they could be submitted and acted upon in a trade practice conference."[17]

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[13] Coogan, Vice President, Alpha (R) Tr. 23895.

[14] Resp. Ex. 731.

[15] Resp. Ex. 730.

[16] Resp. Ex. 729.

[17] (R) Tr. 24280-81.

THE CODE OF ETHICS WENT UNHEEDED.

Reiter testified:

> "I think it is incorrect to say that it was the code of ethics in use, because so far as I am concerned, I did not use it, nor did I have any duties charged to me in respect of this code. • • •
>
> When I was manager of the Chicago division of the Cement Institute from February 1, 1930 until December 31 of the same year, this code of ethics had already been prepared and I was furnished with a single copy of this code and I had it in my file. I have read it but that is all I know about it."[18]

Sweeney, Vice President of Edison, testified:

> "A. No, I do not ever recall having seen a code of ethics of The Cement Institute.
>
> Q. Was there any period, to your knowledge, that your company governed its practices or policies in accordance with any Cement Institute or Cement Institute code of ethics? A. No, there was not."[19]

Bowen, Vice President of Lehigh, testified:

> "Q. What use was made of the code of ethics by your company? A. No use made of it by our company. We had no idea that the code of ethics would lead anywhere unless it should result in a trade practice conference, and in trade practice rules, which might be based upon some basis which might have some basis of enforcement connected with them. Nothing of that sort ever did happen, and, in the meantime, our own company had its own policy of operations and we continued to follow that policy after the code of ethics was adopted just as we had before."[20]

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[18] Reiter, General Manager, Institute (C) Tr. 3007.

[19] (R) Tr. 35801.

[20] (C) Tr. 27002-03.

And again:

"Q. You would not consider your signature to that Code along with the signature of other members as constituting any agreement or understanding between those who signed such a document? A. No. We considered it then as to just what we thought it was then and believed it to be. The first step in the direction of formulating the basis for a trade practice conference."[21]

Tongue, Secretary and Treasurer of Superior Portland, testified:

"14. I have no recollection of ever having read the so-called Code of Ethics until I was requested to do so for the purpose of preparing the comparison of our practices with the Code of Ethics in connection with the preparation of this stipulation, and whether such code ever came into effect or not, in any event it has never been adopted or used by this company. We have had nothing to do with it, do not consider ourselves bound by any of its provisions and it is of absolutely no interest or effect so far as the practices of this company are concerned.

Furthermore, for illustration purposes, I am setting forth below examples of the differences between our practices and those set forth by article and section in the Code of Ethics.

Article I. Standardization of Product: In addition to guaranteeing to meet the existing standard specifications of the American Society for Testing Materials, The American Standards Association, and the United States Government Master Specifications, we have at times guaranteed that our cement would meet the specifications of the State of Washington Highway Department and the City of Seattle Engineering Department.

Article II. Standardization of Sales Contract: In spite of the fact that the Code of Ethics was drafted several years prior to the enactment of the

[21] Bowen, Vice President, Lehigh (R) Tr. 27299.

Code, we did not adopt a standard form of sales contract until the Code became effective.

Article IV. Secret Rebates and Price Concessions: We have at times paid and allowed secret rebates, refunds, credits or unearned discounts.

We have at times purchased bonds or other security issued to finance construction work.

We have in one or two instances painted signs on dealers' warehouses advertising our cement. In addition to the sign the painter would at the same time paint the entire side of the warehouse without charge to the dealer.

We have at times prepaid freight on cement shipments consigned to contractors at stations to which railroad tariffs did not require prepayment. This was done as an accommodation to the customer. For example, a highway contractor taking cement at the station nearest to his contract, and who did not maintain on the job a complete accounting office, would ask us to prepay freight for his account.

We have at times allowed more for cloth sacks returned by purchasers than they were actually entitled to credit for under our published terms and conditions of sale. We have at times allowed the purchaser for damaged sacks which were not in serviceable condition. We have at times paid purchasers of cement for sacks bearing other than our brand."[22]

Two companies recorded the failure of the Code of Ethics to secure uniformity of practice by citing this failure as their reason for resigning from the Institute. On October 8, 1930 the President of International wrote to the Institute as follows:

> "I regret very much the necessity of advising you that, because of the failure of a large majority of the members of The Cement Institute to adhere to its established Code of Ethics, we have no alternative but to withdraw from membership in the Institute, effective immediately."[23]

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[22] Tongue, Secretary-Treasurer, Superior Portland (R) Tr. 42911-13.

[23] Com. Ex. 140 A.

On November 3, 1930, the President of Dewey wrote to the General Manager stating the intention of his company to resign and saying:

> "* * * the decision is not being made wholly because of the resignations of others, but because some of the companies yet members are not adhering to the provisions of the code, either in fact or in spirit."[24]

At the meeting of the Board of Trustees on June 16, 1933, the Code of Ethics was cancelled.[25]

3. The Compendium of Established Terms and Marketing Methods

The appointment of the Trade Practice Committee following the *Schechter* decision for the purpose of carrying on the code activities in anticipation of further legislation along the lines of NRA has heretofore been set forth.[1] This committee at its first meeting, on July 9, 1935, received copies of a draft of Trade Practice Rules prepared in the office of the Institute's attorneys. It was the sense of this meeting that members study these rules and forward suggestions for changes and additions to the chairman for the revision of the draft before the next meeting of the committee.[2] At the next meeting, comments of the committee members were read and particular consideration was given a compendium prepared by Sunderland, the President of Ash Grove. A set of Trade Practice Rules prepared by the Institute's attorneys and the chairman was also distributed. The compendium prepared by Sunderland was

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[24] Com. Ex. 139 A.

[25] Com. Ex. 605 A-C; Resp. Ex. 2174 A-C: Trustees' Meeting, 6/16/33.
Reiter, General Manager, Institute (C) Tr. 16699, 16927-29.

[1] *Supra*, Part III, Sec. I, p. 691.

[2] Com. Ex. 591 C: Committee Minutes, 7/9/35.

approved subject to revisions by the chairman in specific matters.[3]

At the meeting of Institute members on September 26, 1935, the chairman invited a full and open discussion of conditions within the Industry and asked for an expression of the value of a set of trade practices. A discussion of their value followed.[4] On October 28th, F. M. Coogan, Vice President of Alpha, wrote the chairman of the committee, Mr. Reiter:

> "My opinion regarding the Compendium of established terms and marketing methods of the Cement Industry has not changed. Personally, I do not believe in any filing of prices or the establishment of a long series of rules and stipulations with no apparent means of enforcement."[5]

The committee finally submitted its report together with the set of Trade Practice Rules entitled "Compendium of Established Terms and Marketing Methods". The trustees deleted an article relating to price filing and otherwise approved the compendium:

> " • • • as representing the best practices now prevailing in the Industry and as such to be submitted to each member company."[6]

This was published and printed with the Articles of Association and distributed as a pamphlet.[7] The Compendium, verbatim, reads as follows:

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[3] Com. Ex. 591 H: Committee Minutes, 8/6-7/35.

[4] Com. Ex. 599 A-B: Members' Minutes, 9/26/35.

[5] Resp. Ex. 740.

[6] Com. Ex. 624 E: Trustees' Meeting, 12/9/35.

[7] Com. Ex. 561.

COMPENDIUM

of

Established Terms and Marketing Methods

of the

Portland Cement Industry

compiled by

The Cement Institute

Portland Cement Industry products are sold by Members of the Industry to dealers, and to users requiring no dealer service. Marketing policies, involving trading relations between Members and their customers, vary in different localities; but the terms and methods herein set forth represent practices considered sound and generally employed throughout the Industry.

ARTICLE I.

Definitions.

Section 1. The term "Portland Cement Industry" or "Industry" includes the manufacturing and/or the original sale, directly or indirectly, of Products of the Industry by Members thereof to their trade.

Section 2. The term "Industry Products" includes the following:

(a) Portland cements which comply with standard specifications and/or tentative standards for portland cement of the American Society for Testing Materials, and/or the American Standards Association, and/or the Federal Specification Board, and/or the United States Government.

(b) Modified and/or treated portland cements.

(c) Cementitious products in which portland cement or portland cement clinker is an essential constituent, and which are sold in competition with and used in lieu of portland cement, excluding, however, masonry and/or bricklayers' cement marketed and/or used as such.

SECTION 3. The term "Member" includes any individual, partnership, association, corporation, or other form of enterprise, engaged in the Industry.

ARTICLE II.

METHODS OF MARKETING.

SECTION 1. Industry Products are marketed on the basis of a barrel weighing three hundred and seventy-six (376) pounds net, unless a different weight shall have been printed on the containers; and are delivered in the following manner:

(a) In cloth or paper sacks; four (4) sacks of ninety-four (94) pounds net each constitute a barrel, unless a different weight shall have been printed on the container.

(b) In bulk; invoiced on the basis of scale weights at point of origin or enroute or nearest track scales enroute from point of origin. Settlement on carload shipments of bulk cement are on track scale weights of carriers unless consignee proves by notation on freight bill by railroad agent as to fact and extent of shortage occurring, and then only provided claim for shortage is made within fifteen (15) days after arrival at destination. When grain doors, bulkheads, or boards are used to protect shipments of bulk cement, the weight of such dunnage is considered a part of tare weight of car.

SECTION 2. Industry Products are sold either on current or market orders for delivery within fifteen (15) days, or

on orders or contracts for future delivery beyond fifteen (15) days. Quotations on current orders are for immediate acceptance and orders for delivery within fifteen (15) days are subject to shipment on the fifteenth day without notice to buyer.

SECTION 3. Orders or contracts for future delivery beyond (15) days from date of purchase are accepted to cover either period requirements or specific work.

SECTION 4. "Exhibit A" and "Exhibit B" (attached) are forms for future specific sales *orders* and specific sales *contracts*, respectively, the provisions, terms, and conditions of which are used by Members as representing in substance the best practices within the industry. "Exhibit A" (specific sales *order*) is used where a sale is made by a Member to a dealer; and "Exhibit B" (specific sales *contract*) is used:

(a) To cover unfinished commitments with dealers under "Exhibit A," in event of an increase in the market price; such commitments are supported by dealer's record of prior deliveries and user's written estimate of requirements.

(b) To cover new commitments with dealers at prices prior to an advance, but closed during the period immediately following the advance, such contracts being supported by dealer's record of prior deliveries and contractor's written estimate of requirements.

(c) To cover initially all direct sales by Members for delivery beyond fifteen (15) days.

SECTION 5. Contracts for any quarter are quoted or closed not earlier than the first day of the last month of the preceding quarter.

SECTION 6. Where land grant or special freight rates are applicable to shipments to the United States Govern-

ment, Members bidding for such shipments quote in such manner as ensures to the Government the full benefit of such land grant or special rates.

ARTICLE III.

Terms and Conditions of Sale.

[Italicized part quoted in Fdgs. Par. Seven (q)]

Section 1. *All specific sales orders and specific sales contracts for the sale of Industry Products contain definite statements of price, quantities, terms of payment, time and place of delivery, and all other terms of sale necessary to form a complete and unambiguous contract.*

Section 2. Terms of payment are as follows: A cash discount of not in excess of ten cents (10¢) per barrel is deductible from invoice if paid in full within fifteen (15) days from date of issue. A cash discount of not in excess of twenty cents (20¢) per barrel is deductible from invoices for white portland cement if paid in full within fifteen (15) days from date of issue. Invoices not discounted are payable net thirty (30) days from date of issue.

(a) Where purchases involve frequent shipments, a plan of semi-monthly remittance, based on a fifteen (15) day average, is used as follows: All invoices dated from 1st day of the month to the 15th, inclusive, are payable by the 22nd of that month; and all invoices dated the 16th to the 31st, inclusive, are payable by the 7th day of the following month.

(b) Cash discounts are not allowed if remittances are forwarded after the expiration of the fifteen (15) day or semi-monthly period; or if deduction is made in the remittance for cloth sacks to be returned or in transit, and not yet credited; or if the remittance consists in whole or in part of notes, trade acceptances scrip, warrants (whether interest-bearing or not), or any medium other than cash or bankable check for the full amount of invoices from which cash discount is deducted.

(c) The postmark date at point of mailing determines date of remittance.

(d) Unearned discounts are not allowed.

SECTION 3. When Industry Products are shipped in cloth or paper sacks the price includes Member's published deposit or leasing charges for cloth sacks or the selling charge for paper sacks, and payment of such charges is required at the same time as for Industry Product. When used cloth sacks are returned empty to a Member, credit or allowance is in accordance with Member's published terms and conditions of sale.

SECTION 4. Invoices are dated as of date of shipment (provided, where special and unusual conditions prevail, Members in the districts concerned change this provision to conform to such special and unusual conditions), and contain full information as to price, quantity, kind of package, terms of payment, place of deliveries, routing, amount of freight, and any other data necessary to show fully all conditions entering into the sale.

ARTICLE IV.

STANDARDIZATION OF PRODUCTS.

SECTION 1. Portland cement marketed by Members complies with the standard specifications and/or tentative standards for portland cement of the American Society for Testing Materials, and/or the American Standards Association, and/or the Federal Specification Board, and/or the United States Government. Members sell Industry Products other than portland cement under specifications designed to meet special or unusual conditions not adequately or properly covered by the specifications referred to hereinabove.

SECTION 2. Members guarantee their industry Products to comply with the specifications under which they are sold, but are not responsible for their improper use and, therefore, do not guarantee finished work, nor are Members responsible for the condition of Industry Products after delivery.

SECTION 3. Members do not pay or absorb, directly or indirectly, any charges for inspection or tests made by or on behalf of the purchaser, to determine compliance with specifications therefor.

ARTICLE V.

UNFAIR TRADE PRACTICES.

The following trade practices are deemed unfair methods of competition:

SECTION 1. Offering or extending to buyers special benefit in any form (not published and available at the same time and place of delivery to all buyers similarly situated), the purpose and effect of which is to induce sales.

SECTION 2. Knowingly inducing or attempting to induce breach of any existing contract (including specific sales orders) between any other Member and his customer, or interfering with or obstructing in any manner the performance of contractual obligations or services between a Member and his customer.

SECTION 3. Knowingly selling or offering to sell Industry Products for specific projects or period requirements to a purchaser with whom another Member already has a contract to furnish Industry Products for the same requirements.

SECTION 4. Knowingly withholding from or inserting in any quotation, contract, or invoice, any statement, the purpose or effect of which makes such quotation, contract, or invoice misleading or inaccurate in any material particular.

SECTION 5. Compensating salesmen in any manner other than upon a fixed salary and full-time basis.

SECTION 6. Paying or offering to pay, directly or indirectly, any commission or other remuneration (except as provided in Section 5) for the sale of Industry Products.

[Italicized part quoted in Fdgs. Par. Seven (q) and Par. Twelve (b)]

SECTION 7. *Diverting or permitting the diversion of shipments of Industry Products, the effect of which will be to enable a purchaser or user to secure Industry Products at variance with Member's published price-terms for point of final destination.*

SECTION 8. Prepaying transportation charges on shipments of Industry Products consigned to the trade (except to stations to which railroad tariffs require prepayment from any shipping point), or payment of demurrage charges by any Member on such shipments; provided, however, the foregoing, except as to demurrage charges, does not apply to shipments purchased directly by and consigned to departments of the United States Government or State Governments demanding such prepayments.

SECTION 9. Knowingly to ship on a specific sales order or contract, Industry Products in amount in excess of actual requirements of the work therein covered.

SECTION 10. Knowingly to ship Industry Products by any transportation agency which makes payments or concessions by rebates or otherwise, for the purpose or with

the effect of influencing sales or purchases of such Industry Products.

SECTION 11. Paying or offering to pay, directly or indirectly, any advertising expenses of purchasers or users of Industry Products.

SECTION 12. Lavish, excessive, or undignified entertainment of purchasers or users of Industry Products, or others connected therewith; donating funds, or providing banquets or other similar lavish entertainment for purchases or users, or associations thereof, giving or offering to give premiums, personal gifts, or gifts of Industry Products or of any other commodity or article of value, to purchasers or users of Industry Products.

SECTION 13. Selling or offering to sell non-industry products together with Industry Products at combined prices for such products less than the sum of the prices for which said products are sold and/or offered for sale separately.

SECTION 14. The following practices, undertaken for the purpose or with the effect, directly or indirectly, of furthering the sale or use of particular brands of Industry Products:

(a) Purchasing bonds or other securities, issued to finance construction work, either by a Member, its subsidiaries, or by individuals or officers connected therewith; or the acceptance of such bonds, or other securities, in payment wholly or in part for Industry Products; or the advance, loan, or payment of any moneys by a Member; or assuming the cost of bidders' bonds, or endorsing or guaranteeing or in any way relieving a bidder of responsibility for or expense of providing such bonds.

(b) Purchasing, directly or indirectly, fuel or supplies at prices in excess of market price at time of purchase.

SECTION 15. Defamation of a competitor by falsely imputing to him dishonorable conduct, inability to perform contracts, questionable credit standing, or falsely disparaging the grade or quality of a competitor's product, with the purpose and/or effect of misleading or deceiving purchasers or prospective purchasers; or injuring the business of such competitor.

SECTION 16. Selling or offering to sell Industry Products below cost, with the purpose and/or effect of injuring a competitor or substantially lessening competition or tending to create a monopoly in restraint of trade.

SECTION 17. Falsely marking or branding any Industry Product, with the purpose and/or effect of misleading or deceiving purchasers as to the weight, quality, grade, or character of such product.

SECTION 18. Aiding or abetting another in unfair trade practices.

SECTION 19. Interfering with an employee of a competitor, with the purpose and/or effect of hampering or injuring such competitor's business.

SECTION 20. Furnishing articles or facilities of a definite physical nature, whether by way of a loan, lease, or otherwise, without receiving commensurate consideration therefor.

NOTE: The foregoing Sections of Article V illustrate some, but are not inclusive of all, the unfair trade practices encountered in the Industry and in violation of the basic principles of fair competition.

ATTENTION AND INATTENTION GIVEN TO THE COMPENDIUM

Reiter, who had been chairman of the Trade Practice Committee, testified as to the nature of the Compendium as follows:

"Q. Would you consider the compendium as being in any sense a code of fair competition? A. I do not consider it a code of fair competition.

Q. Even though it contained established terms and market methods? A. In order to answer that I would have to answer at length. As I said the other day, the trade practice committee attempted, in the interim period, to supervise the operation under the last code on a voluntary basis and to establish or to write up some ethics for the industry which they hoped that the industry would accept. I, with one other, developed some trade practice rules and presented them to a meeting of the trade practice committee at Denver, which meeting was in the fall of 1935, and at that time, for the first time, I saw this compendium or the compendium from which this has been developed and which was of a far different nature than what I myself suggested for their consideration. This is, as it purports to be, merely a statement of conditions which that member of the trade practice committee believed to exist in the industry.

Q. Conditions, did you say? A. Of conditions.

Q. You mean by that practices and marketing methods? A. Practices and marketing methods—and having failed in these things, presented to the trade practice committee, namely, the set of trade practice rules which I had and this compendium which was suggested by another member and the committee approved the form of the compendium and ordered that it be further developed, or suggested changes in it in the form presented.

Now, it is not a code in that it does not say 'this shall be done' and 'that shall be done' but it attempts to state the conditions and the trade practices which were in existence in the industry.

Q. There were a number of marketing methods covered by the compendium, were there not, which had also been declared unfair by the codes of competition that preceded it? A. Yes, there were some similar sections."[8]

[8] Reiter, General Manager, Institute (C) Tr. 3068-70.

Further:

"A. This compendium was submitted to the board of trustees by the Trade Practice Committee at their meeting held in Chicago on December 9, 1935, and the board accepted it as a statement of marketing conditions existing within the industry, and instructed that it be sent as such to all members of the industry.

Q. Was the compendium, as you have described it—was the compendium adopted by the members of The Cement Institute? A. No, it was not.

Q. Were they asked to sign it, Mr. Reiter? A. No, they were not.

Q. In your experience, Mr. Reiter, did the Institute take any action with regard to this compendium other than what you have already indicated? A. No, Mr. Leisure, it did not."[9]

The testimony of a number of witnesses was taken as to the status and use of the Compendium in the industry. Bowen, Vice President of Lehigh, testified:

"Q. Under what circumstances was it distributed to the industry? A. I recall that I received a copy of the Compendium from the Trade Practice Committee, but by that time I had no idea at all that the efforts of the Trade Practice Committee were going to be in the slightest degree effective, so this Compendium, to me, was just one more paper from the Trade Practice Committee to be filed.

Q. Did it or did it not purport to represent the best practices in the industry? A. Yes, as I recall it, that is what it purported.

Q. Now, from what you have said, did you consider that the Compendium would be effective in establishing the practices it set forth? A. I did not have the least idea that it was going to be in the slightest degree effective.

Q. Did your company make any use of the Compendium? A. We did not."[10]

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[9] Reiter, General Manager, Institute (C) Tr. 17071.

[10] (R) Tr. 27003-04.

Robeson, Vice President in charge of sales of Nazareth, testified that he sent copies of the Compendium to his district managers as a matter of information, but that it did not make any change in his company's methods.[11]

G. E. Warren, Vice President of the Osborne plant of Southwestern, testified:

"Q. Would you tell us whether or not you have ever considered yourself bound to follow any of the terms, conditions of sale, or practices, contained in the Compendium? A. I did not.

Trial Examiner Norwood: Well, did you follow them?

The Witness: Sir?

Trial Examiner Norwood: Did you follow them, of your own free will and accord?

The Witness: Well, to the extent that we—that our practice follows them, it was of our own free will and accord; yes, sir.

Trial Examiner Norwood: Well, did you follow them?

The Witness: I don't know that I have made a comparison to be sure.

Trial Examiner Norwood: You don't know whether you followed them or not?

The Witness: No, sir.

Q. Would you tell us whether or not you made any change in your practices, terms, or conditions of sale in the winter of 1935 or 1936 as the result of the publication of the Compendium? A. I did not.

Q. Would you tell us whether or not you felt free to change your announcements to the trade concerning the terms and conditions of sale after the publication of the Compendium? A. Yes.

Q. Am I correct in my understanding that you don't know whether your practices are similar with regard to the Compendium? A. I have never made a comparison.

---

[11] (R) Tr. 28349.

> Q. Will you tell us whether or not you considered the Compendium was an agreement as to what marketing practices should be used in the industry? A. I do not so consider it."[12]

Wood, General Manager of Green Bag, W. Va., testified:

> "Q. Do you recall, Mr. Wood, receiving any so-called Compendium from The Cement Institute? A. No, sir.
>
> Q. Has it had any effect of any kind on the marketing practices of your company? A. Well, I could not say. I never received it. I do not imagine so."[13]

Koch, Vice President of Lone Star, testified that he paid little attention to the Compendium. "It crossed my desk, and that was all."[14]

As to any difference between practices recommended in the Compendium with practices his company used during the NRA Code period and thereafter, Porter, President of North American, and an Institute Trustee, answered:

> "A. Mr. MacIntyre, I am not at all familiar with that Compendium. I may have read it through at the time, but I don't even know that I did that. I certainly paid very little attention to it. I am not very much interested or concerned with the details of marketing practices, and I never compared that Compendium with our practices or the NRA practices."[15]

And again:

> "Q. Will you tell us in what way it [the Compendium] was used by your company? A. It was not used at all, just went into the files.

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[12] Warren, G. E., Vice President, Southwestern (Osborn) (R) Tr. 29217-18.

[13] (R) 29539.

[14] (R) Tr. 33188.

[15] (R) Tr. 34121-22.

Q. Did The North American Cement Corporation make any change in its practices or policies either as a result of that compendium or at the time that the compendium was distributed? A. No; I am quite sure we made no changes in our policies or practices as a result of this publication."[16]

Affleck, President of Universal Atlas, testified:

"Q. Was anything—any understanding or agreement at that meeting, that those who were present and who were favorably disposed toward this compendium would be bound by its terms? A. No, not at all."[17]

"There wasn't anything new in the trade practice or the compendium, to our company, and although I attended the meeting it didn't affect us because it wasn't any different from what we had found after long, long experience would be good, sound, fair, ethical practice, which we had followed."[18]

Thereafter the witness went over each section of the Compendium and described it as merely customary practice which had prevailed for many years and representing the product of experience and business wisdom.[19]

And again:

"Q. Well, the Compendium quite largely restated or reaffirmed many of the provisions that were contained in the NRA Code? A. Yes.

Q. And were there not some provisions in the Compendium that had not been in common practice prior to the NRA Code? A. As I remember that document, which I did not study very carefully, I do not think it contained anything new. I think it was a restatement of practices and procedure that had been in effect for a long time.

[16] Porter, President, North American (R) Tr. 33918-19.

[17] (R) Tr. 34777.

[18] Id., Tr. 34777-78.

[19] Id., Tr. 34778-95.

Trial Examiner Norwood: You mean in effect with respect to all the companies?

The Witness: Practically all, your Honor, exceptions here and there as between companies. Some companies were—especially the smaller companies—were rather careless and some exceptions, of course, as to certain provisions."[20]

MacDonald, Vice President of Northwestern States, testified:

"Q. Did you ever make any use of this Compendium? I will put it this way: Did the Compendium have any effect upon the marketing practices of the Northwestern States Portland Cement Company? A. No, sir.

Q. Did your company consider itself bound to adopt or follow any of the terms or conditions of sale or practices contained in the Compendium? A. No, sir.

Q. Was there any agreement or understanding that your company should or should not follow those practices? A. No, sir.

Trial Examiner Norwood: Did you feel, after those public utterances, that you would be free to follow the practices? Did you or did you not?

The Witness: It went further than that, your Honor. We had signed the President's Reemployment Agreement, and we were supporting this whole recovery program, and I thought that, as far as the Federal Government was concerned, it was requesting us, and we having gone as far as we had, we were under some sort of moral obligation to continue until the Government could find out where they stood under this decision of the Supreme Court.

Trial Examiner Norwood: Then, did you consider this Compendium as binding or not binding?

The Witness: Not binding; no, sir.

Trial Examiner Norwood: In a moral sense, how was it?

The Witness: As to this Compendium, as I recall it, we figured that that was a temporary

[20] Affleck, President, Universal Atlas (R) Tr. 34982.

thing, adopted by the industry to carry through until the Federal Government found out where they were going to be at, or whether they were going to pass a new law to take the place of the NRA. We did not consider that at the time as anything of a permanent nature, that it was just a temporary vehicle to give the officials time to find out where they stood. That is what I thought.

Trial Examiner Norwood: Did you follow that for a while?

The Witness: Yes, sir."[21]

And again:

"A. * * * As far as our sales policies are concerned, we never adopted the Compendium, and I believe that there are some changes in our policies, and were at the time, that we never adopted to conform to the Compendium.

Q. Were your sales terms and conditions and sales policies any different than your competitors during the period of the Code? A. Yes, sir."[22]

Alexander, President of Missouri, testified:

"Q. Mr. Alexander, did your company make any change in its marketing policies or practices as a result of the issuance of this Compendium? A. We did not.

Q. Did your company use that Compendium in any way? A. We did not.

Q. Did the Missouri Portland Cement Company agree with any of its competitors to follow any of the practices contained in the Compendium? A. We did not."[23]

And again:

"Q. You attended the meeting, did you not, at which the Compendium of Trade Practices was ap-

[21] MacDonald, Vice President, Northwestern States (R) Tr. 36507-09.

[22] Id., Tr. 36643.

[23] (R) Tr. 37331.

proved by the board of directors of the Institute? A. I may have. I do not remember.

Q. Didn't that Compendium contain discounts and terms of sale? A. I do not believe I ever read the Compendium, Mr. Wooden.

Q. If it did contain discounts and terms of sale, you would not consider that that represented any meeting of the minds on the part of the directors who approved it? A. I would not consider that it meant anything more than the general practice had been in the trade for eight or ten years."[24]

And again:

"A. Well, of course, there was nothing compulsory about the Compendium, to my knowledge.

Q. Well, did you consider it an effort to influence the marketing policies? A. I certainly did not."[25]

This witness attended the meeting of Trustees at which the Compendium was approved and counsel sought to secure from him an admission that he had attended meetings at which there had been discussion of marketing policies. He testified further:

"A. Well, of course, if you want to give consideration of the Compendium,—distribution of the Compendium,—if you want to call that a discussion of the marketing policies, why, you may. I do not know whether it is marketing policies or not. I do not think I read it.

Q. Well, the minutes refer to them as the best practices prevailing in the industry. Weren't they marketing policies? A. Well, I do not know. I do not think I ever read the Compendium. I do not remember reading it. I was not impressed with it at all."[26]

[24] Alexander, President, Missouri (R) Tr. 37390.

[25] Id., Tr. 37415.

[26] Id., Tr. 37418.

Lucas, Vice President of Petoskey, testified that his company did not make use of or agree to abide by the provisions of the Compendium.[27]

W. R. Blair, Sales Manager of Southwestern, El Paso, testified:

> "Q. And can you distinguish in your own mind between the so-called Code of Ethics and the Compendium of Established Terms of Marketing Methods? A. No. I have seen—I guess I have seen both copies, and I have heard a lot about it, but I do not pay any attention to either one of them.
>
> Q. Did you change the policies of the El Paso mill to conform to the provisions either of the Code of Ethics or of the Compendium? A. No."[28]

And again:

> "Q. Did you understand that the Compendium of The Cement Institute, to which you referred in your direct examination, was in the nature of a new Code of Ethics following the cancellation of the NRA Code? A. No; I don't remember receiving it or paying any attention to it until this case came up.
>
> Q. Well, is it your testimony that you did not regard it as in the nature of a new Code of Ethics? A. Yes, sir. I don't recall paying any attention to it, either when it came out or later."[29]

Dawson, Vice President of Medusa, could not recall that his company made any use of the Compendium.[30]

Hoenig, Sales Manager of Nebraska, testified:

> "A. I think it [the Compendium] came into the office at that time—that is, I am not sure just when.
>
> Q. Well, did you distribute that to your sales organization? A. No, we did not distribute it, and we did not use it.
>
> Q. Did you attempt to operate your business in any sense in accordance with the provisions set forth

[27] (R) Tr. 38839.

[28] (R) Tr. 39150.

[29] Id., Tr. 39305.

[30] (R) Tr. 40190.

in this document? A. No, we did not. We did not have this document in mind at all in carrying on our business and business policies. We had what we had outlined ourselves, and if this in any way corresponded, that was something that we did not pay any attention to.'"[31]

Brooke, Vice President of Monarch, testified that his company had made no use of the Compendium and made no change in its practices and policies upon receipt of a copy of it or because of its publication.[32]

And again:

"Q. Did you read the Compendium Mr. Seeley asked you about with a view to determining whether the practices described in it conformed to your own? A. I have read it. It has been a long time. I could not tell you what is in it, but I am sure I have read it.

Q. Did the practices that are described in it conform to those that you were using at that time? A. Well, I think, generally speaking, they did. Of course, there were exceptions, and things come up that required individual treatment or decision at the time.

Q. Did you make any change in your policy, modification of any one of your policies after reading that Compendium? A. No, sir.'"[33]

R. W. Moore, Vice President of Dewey, testified:

"Q. Did the Dewey Company have any agreement or understanding to follow, or that it should follow practices, or any practices set forth in this compendium, Mr. Moore? A. No, sir. It has always felt free to do as it pleased in regard to those practices.

Q. Well, did your company make any change in its practices to bring them into agreement with, or as a result of this compendium? A. No, sir. Our

[31] Hoenig, Sales Manager, Nebraska (R) Tr. 42100.

[32] (R) Tr. 42304-05.

[33] Id., Tr. 42415-16.

practices were more favorable to the dealers than those in that compendium, the way we sized it up.

Q. Did you, or any one in the Dewey Company, to your knowledge, Mr. Moore, make any use of this compendium? A. Well, the only use I know we made of it, we read it and decided it did not add anything to help us, so paid no attention to it."[34]

Coogan, Vice President of Alpha, and a member of the Trade Practice Committee at the time the Compendium was drafted, testified:

"A. Well, so far as I was personally concerned, I took very little interest in either the preparation or distribution of the Compendium of Trade Practices. I didn't believe in it, and so far as our own company is concerned, we received two copies of the compendium, one of which came to me and one to our president, and upon my recommendation we took no further action with it and did not distribute the compendium to our organization. We simply each kept the copy that had been sent us and paid no further attention to it.

Q. Well, what about your own company? Following the issuance of that Trade Practice Compendium, did the Alpha Company in any respect change any of its practices which it had theretofore followed? A. No, we didn't change any practice at all. We simply continued the practices that we had been pursuing while the Code was in effect."[35]

And again:

"Q. Did the Alpha Company's policy differ from the practices set forth in the Compendium which the trustees of the Institute approved? A. The policy of the Alpha Company was just about the same before, during, and subsequent to the Code.

Trial Examiner Norwood: Well——

A. (Continuing) Except in so far as the changes which we made in 1935 as to the classification of business.

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[34] Moore, Vice President, Dewey (R) Tr. 47067-68.

[35] (R) Tr. 23942.

Trial Examiner Norwood: Well, did they happen to conform to the Compendium?

The Witness: Well, if you wanted an answer to that, I would have to take the Compendium and take each paragraph of it and tell you. In a general way, I should say that they did because the Compendium represented the best practices in the industry, and I hope our company had the best practices in the industry."[36]

Elcock, Vice President of Southern States, testified:

"Q. Has the Southern States Portland Cement Company had any understanding or agreement with anybody as to whether or not they would follow the practices set forth in that document? A. We have not.

Q. As a matter of fact, are you familiar enough with the document to state whether or not the practices which are referred to in that Compendium were or were not the practices followed by the companies with which you had been associated prior to 1935? A. I think I could answer that best, Mr. Werle, by saying that what is laid down in this Compendium is a good way to go along and merchandise your stuff. I think it is practices that have grown up through the years, that all people who have to merchandise a product see good methods under which to merchandise. I think you will find that practically all companies did market their materials in this way long before this.[37]

* * *

Q. Do you have any understanding or agreement with any other Respondent that you will adhere to some Code of Ethics or Code of Practices, or anything of that kind? A. No, sir.

Q. With respect to this Compendium that we discussed a moment ago, Commission's Exhibit 561, was that distributed to your salesmen, or anything of that kind? A. No."[38]

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[36] Coogan, Vice President, Alpha (R) Tr. 24838-39.

[37] (R) Tr. 37602-03.

[38] Id., Tr. 37608.

Horner, President of Kosmos, testified:

> "Q. Well, this Compendium that the Examiner referred to, did the Kosmos Company agree with any competing manufacturers to adopt the practices and terms contained in the Compendium? A. No, we did not. I don't think I have ever read the Compendium. I know we received a copy or copies of it."[39]

Dannelly, Vice President of National, testified:

> "Q. Will you tell me whether or not you distributed copies of that to your sales force? A. No, I do not think we did. I am not sure, but I do not think so.
>
> Q. Well, do you understand that there was any obligation on the part of your company to observe the provisions of that document? A. No, sir.
>
> Q. Would you just look at it sufficiently, beginning on page 12, running through to page 17, will you look at that sufficiently so that you will be able to tell us whether or not there was any provision, or there are any provisions in those pages that had not been a part of the practices or policy of the National Company prior to December of 1935? A. I do not recall that there are any of them here any different."[40]

F. B. Warren, Vice President and Manager of the Osborne plant of Southwestern, testified that he had never heard of the Compendium.[41]

Russell, Vice President of Peerless, could not recall the document and felt sure that his company never adopted it in any way.[42]

Manley, General Manager of Hawkeye,[43] testified that his company made no use of the Compendium.

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[39] (R) Tr. 37002-03.

[40] (R) Tr. 39587-88.

[41] (R) Tr. 32225.

[42] (R) Tr. 34301-02.

[43] (R) Tr. 41817.

PART XI

THE CEMENT INSTITUTE'S SERVICES

Introduction

Chart XI-A on page 1876 shows Institute activities from the date of its organization to the date when the complaint was filed in this proceeding on July 2, 1937. Supporting citations are found at the places in this appendix where evidence as to these activities is digested.

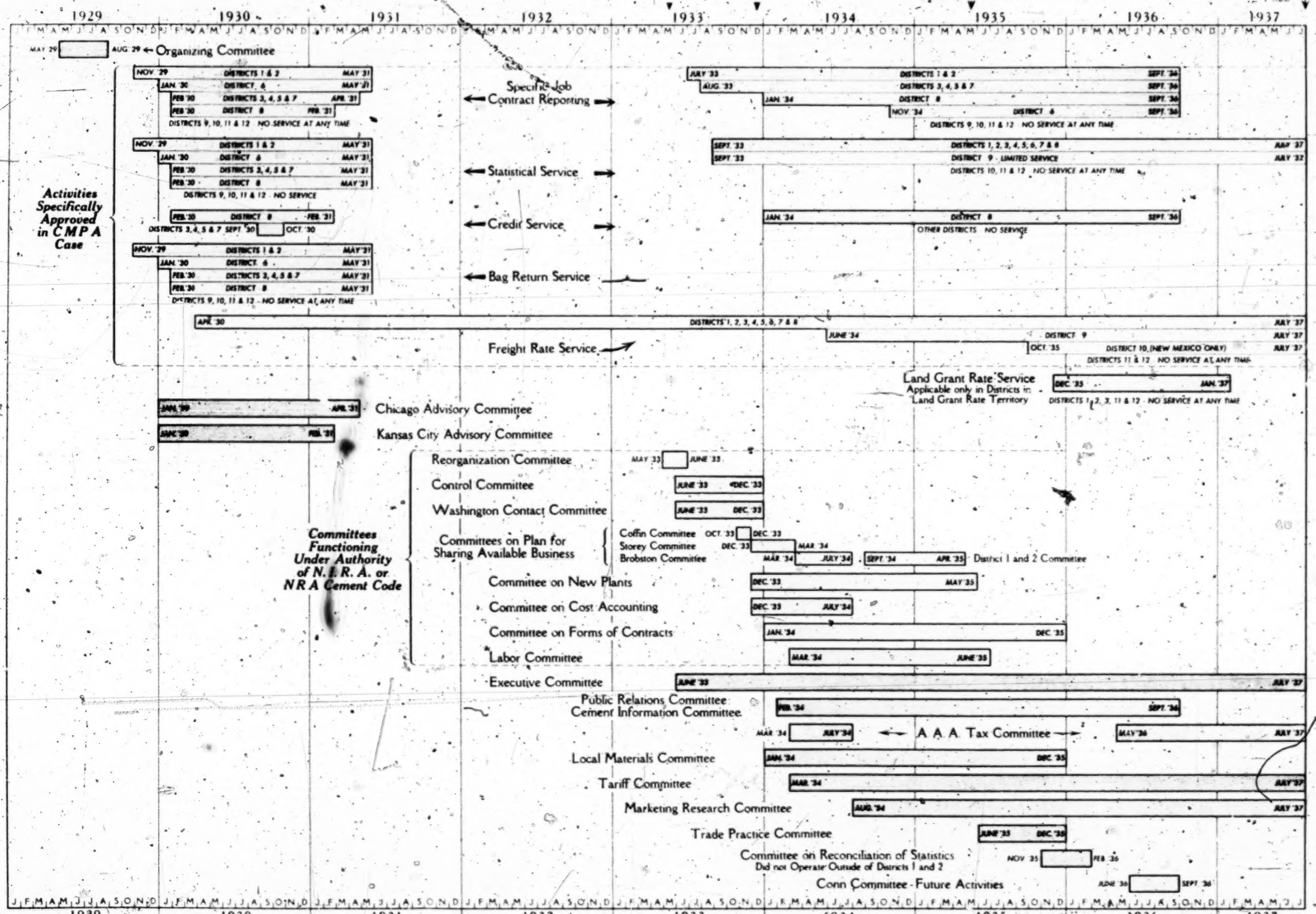
In this Part XI evidence is digested as to credit information (A below), information on specific job contracts (B below), statistics (C below) and committee activities (D below) not elsewhere described in connection with the subject matter to which the committee activities related. The freight rate service is covered in Part V.

A. Credit Information.

Article XIV, Section 1 of the original Articles of Association provided:[1]

> "On or before the fifth day of each calendar month, (or on such other dates as may be fixed by the Board of Trustees) each member shall forward to the Institute the following information:
>
> (a) A statement as of the first of the month of all accounts outstanding over sixty days, whether represented in an open account or by bills receivable, giving total indebtedness as well as amounts outstanding over sixty days, stating whether disputed or not, and giving the name and address of the debtors, amounts unpaid, and time overdue.
>
> (b) A list of accounts placed in attorneys' hands for collection.
>
> The Institute shall furnish to any member, on request or otherwise as the Board of Trustees may direct, any and all credit information collected by the Institute concerning any purchaser or prospective purchaser.

[1] Com. Ex. 138 J.


1929
1930
1931
1932
1933
1934
1935
1936
1937
MAY '29 AUG '29 ← Organizing Committee
Activities Specifically Approved in C M P A Case
NOV '29 DISTRICTS 1 & 2 MAY '31
JAN '30 DISTRICT 6 MAY '31
FEB '30 DISTRICTS 3, 4, 5 & 7 APR '31
FEB '30 DISTRICT 8 FEB '31
DISTRICTS 9, 10, 11 & 12 - NO SERVICE AT ANY TIME
NOV '29 DISTRICTS 1 & 2 MAY '31
JAN '30 DISTRICT 6 MAY '31
FEB '30 DISTRICTS 3, 4, 5 & 7 MAY '31
FEB '30 DISTRICT 8 MAY '31
DISTRICTS 9, 10, 11 & 12 - NO SERVICE
FEB '30 DISTRICT 8 FEB '31
DISTRICTS 3, 4, 5 & 7 SEPT '30 OCT '30
NOV '29 DISTRICTS 1 & 2 MAY '31
JAN '30 DISTRICT 6 MAY '31
FEB '30 DISTRICTS 3, 4, 5 & 7 MAY '31
FEB '30 DISTRICT 8 MAY '31
DISTRICTS 9, 10, 11 & 12 - NO SERVICE AT ANY TIME
APR '30 DISTRICTS 1, 2, 3, 4, 5, 6, 7 & 8 JULY '37
JUNE '34 DISTRICT 9 JULY '37
OCT '35 DISTRICT 10 (NEW MEXICO ONLY) JULY '37
DISTRICTS 11 & 12 - NO SERVICE AT ANY TIME
Specific Job Contract Reporting
JULY '33 DISTRICTS 1 & 2 SEPT '36
AUG '33 DISTRICTS 3, 4, 5 & 7 SEPT '36
JAN '34 DISTRICT 8 SEPT '36
NOV '34 DISTRICT 6 SEPT '36
DISTRICTS 9, 10, 11 & 12 - NO SERVICE AT ANY TIME
Statistical Service
SEPT '33 DISTRICTS 1, 2, 3, 4, 5, 6, 7 & 8 JULY '37
SEPT '33 DISTRICT 9 - LIMITED SERVICE JULY '37
DISTRICTS 10, 11 & 12 - NO SERVICE AT ANY TIME
Credit Service
JAN '34 DISTRICT 8 SEPT '36
OTHER DISTRICTS - NO SERVICE
Bag Return Service
Freight Rate Service
Land Grant Rate Service
Applicable only in Districts in Land Grant Rate Territory
DEC '35 JAN '37
DISTRICTS 1, 2, 3, 11 & 12 - NO SERVICE AT ANY TIME
Committees Functioning Under Authority of N. I. R. A. or N R A Cement Code
JAN '30 APR '31 Chicago Advisory Committee
JAN '30 FEB '31 Kansas City Advisory Committee
Reorganization Committee MAY '33 JUNE '33
Control Committee JUNE '33 DEC '33
Washington Contact Committee JUNE '33 DEC '33
Committees on Plan for Sharing Available Business
Coffin Committee OCT '33 DEC '33
Storey Committee DEC '33 MAR '34
Brobston Committee MAR '34 JULY '34 SEPT '34 APR '35 District 1 and 2 Committee
Committee on New Plants DEC '33 MAY '35
Committee on Cost Accounting DEC '33 JULY '34
Committee on Forms of Contracts JAN '34 DEC '35
Labor Committee MAR '34 JUNE '35
Executive Committee JUNE '33 JULY '37
Public Relations Committee
Cement Information Committee
FEB '34 SEPT '36
MAR '34 JULY '36 ← A A A Tax Committee → MAY '36 JULY '37
Local Materials Committee JAN '34 DEC '35
Tariff Committee MAR '34 JULY '37
Marketing Research Committee AUG '34 JULY '37
Trade Practice Committee JUNE '35 DEC '36
Committee on Reconciliation of Statistics
Did not Operate Outside of Districts 1 and 2
NOV '35 FEB '36
Conn Committee - Future Activities
JUNE '36 SEPT '36

> To facilitate the statement of the reasons for the accounts being overdue a set of symbols may be devised and printed on the reverse side of each statement so that symbols only need be shown on the face of the report."

The Articles as revised in June, 1933 do not contain this detailed provision, but only a repetition of the statement that one of the purposes of the Institute is to collect and disseminate "information concerning credits".[2]

The Chicago Division and the Kansas City Division offices of the Institute were the only ones to issue credit data.[3] The Chicago Division issued it for Districts 3, 4, 5 and 7 for only two months—September and October 1930[4] —and discontinued it "due to the increased activity of the cement group working within the National Association of Credit Men, making the credit report of the Institute unnecessary".[5] In February, 1934, when the Chicago Division again desired to establish a credit service, the Board of Trustees considered the matter and advised against it and recommended that manufacturers support the work of the National Association of Credit Men.[6]

The Kansas City Division operated credit service in District 8 continuously from the opening of the office in February, 1930 to the closing of the office in February, 1931 at the time of the curtailment of Institute activities and again from the time the office was opened in January, 1934 to September, 1936 when Institute activities were again curtailed and the office closed.[7]

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[2] Com. Ex. 561: Revised Articles.

[3] Resp. Ex. 143 A: McConnell, Institute Manager, report to members dated November 1, 1930.

[4] Resp. Ex. 155: Copy of Credit Report, dated September 30, 1930.

[5] Resp. Ex. 143 A, *supra.*

[6] Com. Ex. 618 C: Trustees' Minutes, Feb. 21, 1934.

[7] Com. Ex. 595 E.
Com. Ex. 601: District meeting, 9/29/36.

B. Information on Specific Job Contracts.

1. Nature of Specific Job Contracts

From the testimony set forth below a specific job contract may be defined as a manufacturer's agreement with a dealer or contractor to furnish an estimated amount of cement over a specific period of time to be purchased and delivered as required by the purchaser for consumption in a specific piece of work and at a named price which will not be advanced if the manufacturer's market price increases, but will be reduced upon any balance still to be delivered if the manufacturer's market price declines during the life of the contract. In effect, it insures the maximum cost for cement to the contractor for his job upon the conditions that the cement purchased under it is used solely for work on the designated job which the contractor represents that he actually has, and the manufacturer is not required to furnish more cement than the job requires.[1]

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[1] Specimen specific job contracts:

Aetna	Resp. Ex. 1981
Alpha	Resp. Ex. 612
Bessemer	Resp. Ex. 2342 G
Cumberland	Resp. Ex. 3060
Federal	Resp. Ex. 2088
Green Bag of West Va.	Resp. Ex. 1849
Hermitage	Resp. Exs. 2699, 2700
Huron	Resp. Ex. 2394 Z35
Kosmos	Resp. Ex. 2752
Lehigh	Resp. Ex. 1120
Lone Star	Resp. Ex. 2358 o
National	Resp. Ex. 3018
Nazareth	Resp. Ex. 1442
Nebraska	Resp. Ex. 3411 C, D
Southwestern	Resp. Ex. 1697
Superior	Resp. Ex. 3457
Universal Atlas	Resp. Ex. 3081 B
Volunteer	Resp. Ex. 2279

In practice the manufacturers extend the life of the contract if the job is not completed within the stated time.[2]

Coogan, Vice President of Alpha, testifying as to the nature and the purpose of the specific job contract as used by Alpha, said:

> "A. The purpose is to give us something on which we feel we can hold our customer, and so we will have a definite order, and a definite commitment from him that he will take that cement for the particular work required within the time specified in the contract.
>
> It gives us a little something definite on which we can base—on which we can base some little—what I am trying to say, is, on which we can get some little on some sort of estimate of future operations.
>
> Q. Does it give the dealer anything? A. Yes, it gives the dealer and the consumer an absolute guaranty of the price beyond which we cannot go and enables them to sell to a contractor who might have bid on a specific job and used a specific price for the cement.
>
> It assures that he will keep on getting the cement for that particular work."[3]

* * *

> "Q. Mr. Coogan, do you require that the purchaser already have the award or be committed to furnishing the cement for the specific work in question before you execute a specific job contract? A. Yes. We do.
>
> Q. How do you provide for the prospective buyer who desires to be protected on a specific job where he has not got a contract, and where he has not yet received the award but merely anticipates it? A. Where we quote to the dealer and leave our quotations open for a stated period of time, now, if the contract is, or if the bids have been opened but the contract has not been awarded, or even if the bids have not been opened and the contract has not been

[2] Reiter, General Manager, Institute (C) Tr. 4207.

[3] Coogan, Vice President, Alpha (R) Tr. 33454-55.

awarded, and we should advance our price, we will protect the dealer.

We will make what we call a provisional contract with the dealer which will protect both him and his customers on the cement in the event that he is awarded the contract.

Now, we do that only in case he is the low bidder. If he is the low bidder, on the job, and the job has not been awarded at the time these prices advance, he is given a provisional contract which protects him in the event he is given the job.

Q. Now, if the buyer obtains the award, is he then entitled to a specific job contract under the terms stated in your specific job contract? A. Yes, sir. He is."[4]

Brobston, President of Hercules, discussing the nature of this contract and the danger to the manufacturer of selling cement under the market price for use outside the specific job stated in the contract, testified:

"Q. * * * What has been your actual practice since 1903 with regard to that,—have you required that a specific job contract be entered into when you were selling cement for future requirements? A. We started right then and there to try and get it in every case, and as the years went on we have come to the point where we will only sell on what we believe to be a legitimate specific job contract for the amount that the job will actually take.

Q. You say you try. On these contracts for future delivery, is there any uncertainty from your standpoint today? A. Yes, even though you have a specific job contract you don't always get it. The dealer may try to cover with more than one company, or he may cover for more than the job will take. We do our best to prevent that, but we cannot always do it—a company of our size cannot investigate thoroughly every single contract, and we often find this argument as to whether we have all of a contract or whether the contract takes the amount that the dealer wants to take from us.

[4] Coogan, Vice President, Alpha (R) Tr. 23458-59.

Q. Does the going up or down of the price affect those specific job contracts? A. Yes. Of course, that's why we put in the provision in the contract that in the case of a decline we would lower cost of the contract so we would get it even if it did go down.

Q. How about when it goes up?

Trial Examiner Norwood: How does that protect you, then, as long as you have to give a guarantee against decline,—how is that contract any advantage to you?

The Witness: Why, we have the business, your Honor.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. That is when you have a decline? A. Yes.

Q. Well, what happens when the price goes up, Mr. Brobston? A. Well, we have to furnish the amount really called for by the job, but very frequently the dealer will try to get more than is actually used on that job, and if he is at the low price, he sells it from his yard. We have to watch that as closely as we can.

Q. Well, as to the maximum quantity that you are about to deliver, under the contract,—is the maximum quantity which you may be obliged to furnish certain and definite? A. No, it is not certain and definite. The contractor or the dealer tells us what he thinks will be required on the job. If the job actually requires a little less or a little more we would not hold him to that. * * *"[5]

Describing the optional nature of these contracts Reiter testified:

"Q. Were these contracts so-called, something in the nature of an option to purchase or what was their status in that respect? Could one side enforce them against the other or what? A. To the best of my knowledge, Mr. Wooden, they are a legal contract.

[5] (R) Tr. 26149-51.

They are in the nature of an option to purchase because, first, they include a guarantee against decline clause; that is, the named price in the contract follows a declining market but does not follow an increasing market.

So far as I know, those contracts could be enforced at law. The purchaser could be made to take the cement for which he had signed, and I am informed that some years ago a company actually sued a buyer to perform under such a contract, but if that were done, that buyer would never buy any more cement from the cement company.

Q. Suppose that were the case when the market declines? A. No, because the contract price would follow a declining market, and, as a matter of fact, the cement companies make no effort to force delivery under these contracts because, by so doing, they lose customers. So that it amounts to an option."[8]

Examined as to the power of the dealers and his reason for entering a contract which compelled him to sell over a protracted period cement at a fixed or lower price, foregoing any advantage in an advance in the current market price, Letzkus, Sales Manager of Pittsburgh, testified:

"Q. Why do you continue to use specific job contracts that require you to deliver cement for six to twelve months at a specified price, and no advantage to you in return? A. Well, that is the only way the customer will buy the cement for a specific job. If he is going to bid on a job——

Q. Why don't you sell your cement outright to him and make him take the risk instead of you taking it? A. Well, you cannot do it. Your competition is not doing it that way, and we have got to meet competitive conditions, but if I am clear in your meaning, and a man goes to bid on a job, and he is going to use twenty or thirty or fifty or a hundred thousand barrels of cement, that is part of his bid, he gets that, and he cannot afford not to be protected if a higher price should come in on him.

[8] (C) Tr. 4203.

Q. I can understand his angle, but it has always been a mystery to me, Mr. Letzkus, why the cement industry continues to use specific job contracts which are entirely unilateral, in favor of the dealer? A. Entirely one-sided.

Q. Yes. A. And if the price goes down, we have to reduce the price, but if it goes up, we cannot.

Q. And you do not get the benefit of a price advance? A. No. I think it is ridiculous, myself, but you cannot change it. I do not know how to change it. I would like to."[7]

2. Problems Presented by Specific Job Contracts

[The report of the Committee on Trade Conditions issued by the Association of American Portland Cement Manufacturers in 1915, discussing problems raised by specific job contracts, said:

"Great demoralization results from the ability of dealers to place orders with manufacturers for large amounts for deferred delivery upon the representation that the cement is for specific work which the dealer has sold, all or part of which has in reality not been sold by dealer for such work, and which is later sold by dealer from time to time when the market has advanced at lower prices than warranted by the manufacturers' prices to such dealer and lower than other dealers in the same town can sell at, based on manufacturers' prices to them for current requirements. This results in demoralization to the detriment of all manufacturers concerned in such a given market—the manufacturer who has such an unspecific work contract delivering cement at prices below prevailing market prices, and the manufacturers who are trying to sell through other dealers in the same market being unable to secure

[7] (R) Tr. 38025-26. To the same effect:
McGovern, Sales Manager, Hermitage (R) Tr. 36150.
Coogan, Vice President, Alpha (R) Tr. 23995.
Bowen, Vice President, Lehigh (R) Tr. 26803.
Brobston, President, Hercules (R) Tr. 26123-25.

business because of the disadvantage under which such dealers are placed in connection with the dealer who is being supplied by the other manufacturer at price below prevailing market.

[Italicized part quoted in Fdgs. Par. Thirteen (c)]

Urging dealers to place orders for extended delivery for specific work, and permitting such dealers, at their option, to take more or less cement on such orders than actual quantity used in the work, has been one of the most objectionable devices and practices known, and has done more than any other one thing to bring about demoralization. This practice is a twin brother to 'guaranteeing prices against decline,' and no good or wise merchant ever resorts to such practices. If a contract is made it should be a fair one and observed by both parties.'']¹

[The Portland Cement Association, in its pamphlet, Trade Practices in the Cement Industry, issued in January 1919, also discussed abuse of these contracts in the same vein.

[Italicized part quoted in Fdgs. Par. Thirteen (c)]

"Great demoralization results from the ability of dealers to place orders with manufacturers for large amounts for deferred delivery upon the representation that the cement is for specific work which the dealer has sold, all or part of which has in reality not been sold by dealer for such work. In such a case the cement is later sold by dealer from time to time when the market has advanced at a price lower than warranted by the manufacturers' current prices to such dealer and lower than other dealers in the same town can sell it, based on manufacturers' prices to them for current requirements. This results in demoralization to the detriment of all manufacturers concerned in the market affected—the manufacturer who has such an unspecific contract delivering cement at prices below prevailing market prices, and the manufacturers who are trying to sell through other dealers being unable to secure business

¹ Com. Ex. 3193, pp. 8-9.

because of the disadvantage under which such dealers are placed in competition with the dealer who is being supplied by the other manufacturer at price below prevailing market.'']²

In his letter of July 19, 1933 to General Johnson accompanying the draft of the first proposed NRA Code, Conn, President of the Institute, discussing specific job contracts and the problem which they presented to the industry, said:

"Current orders present no serious marketing problems but future orders or contracts present some exceedingly complex difficulties. * * *

In the day-to-day operation of the Cement industry, a single buyer frequently has contracts [specific job contracts] with several manufacturers, closed at different times at different prices, for delivery over widely varying periods, but on all of which actual deliveries are being made concurrently. A manufacturer may have several hundred or thousand contracts on his books, at varying prices and for varying delivery periods, on which he is shipping currently.

Because the product is standardized, not only as to one manufacturer but as to all, there is constant danger, accentuated by an increase in price, that cement shipped under a given contract and for a specified purpose, may be used by the buyer for some other purpose. The misuse of contracts constitutes one of the cement manufacturer's major marketing problems. Its control by the individual manufacturer is complicated by the difficulty of determining the actual amount of cement required for a given project; by the need for endeavoring to check the progress of a multitude of operations; and by the readiness of the user to accept all brands of cement interchangeably, thus facilitating diversion and substitution of brands.

The manipulation and misuse of contracts create many unfair competitive situations. It is obvious that a buyer having contracts for the delivery of cement over an extended period of time, especially

² Com. Ex. 3192, p. 9.

contracts at prices below the price current in the market at the time he calls for delivery from the manufacturer, gains an unfair advantage over his competitors if he is able to divert the cement to a purpose other than that for which it was originally bought as specified in his contract. If he is a dealer, he is able to undersell competitive dealers and thereby unfairly destroy the dealer market. If he is a contractor, he is able to underbid his competitive contractors and thereby gain an unfair advantage over his competitors. In either case there has been an improper use of protection given by the manufacturer in response to a proper business need and the manufacturer's market is also adversely affected.'"[3]

Bowen, Vice President of Lehigh, was examined on the details of a specific job contract issued by Lehigh on its own form to Allied Coal & Material Company for 2,000 barrels of cement to be used in the construction of a business block in Indianapolis,[4] and his attention was drawn to the purchaser's representation as to the purpose for which the cement was to be used and a provision in the cancellation clause stating: "It is understood and agreed * * * that if any representations made by said purchaser to the cement company * * * are untrue" the company may cancel. Explaining this clause and the risks to the manufacturer from "misuse" of the specific job contract, Bowen testified:

"A. That clause was intended to protect us against misuse of the contract to make sure that the cement was used for the work which the contract covered, and to enable us to check and make sure that it was so used.

Q. Well, you say 'misuse,'—what methods of misuse do you have reference to against which you sought protection? A. I should say, first that our practice of extending contract protection for future

[3] Com. Ex. 556, pp. 24-25.

[4] Resp. Ex. 1123: Job Contract, dated January 13, 1923, issued by Lehigh to Allied Coal & Material Co.

delivery involves a good many risks, because we extend that protection at any one time to many hundreds of buyers and on a good many million barrels of cement. Unless we can be sure that our specific contracts really are specific, that is, that the work really exists, that the quantities covered by our contracts are correct, and that the cement actually will be used on that work, we would be quite unable to figure any sort of future program of operation or shipments.

It is absolutely indispensible for us to have the best and most accurate knowledge that our contract obligations represent commitments that will be called for, because that is so we have during our entire experience included in our contract forms clauses designed to give us the protection that we consider only reasonable and to protect ourselves against misuse.

Now, this misuse most often takes one of two forms—either the buyer takes cement at his customary place of delivery but uses the cement for some other purpose than the one specified in the contract, or else he may divert the cement from the point provided in the contract and to which the cement is shipped to some other point. In that case we are subjected to a double deception, not only is the cement not used for the purpose covered by the contract, but such a shipment has always resulted in embroiling us in a controversy with our dealer at the point to which the cement is moved.

* * *

Q. There is a column in this contract, Mr. Bowen, which states: 'This price, which is special, has been given to the purchaser by the cement company because of the purchaser's representation as to the use of the cement'.

Mr. Bowen, in what respects was the price mentioned in the specific job contract a special price? A. It was special in that our ordinary method of selling limited the price protection to a 15-day period. When we extended price protection to customers for longer periods we considered that we were giving them special consideration in return

for which we felt ourselves justified in providing certain protective clauses in our contract."[5]

MacDonald, Vice President of Northwestern, testified that in these contracts there were two types of "padded" contracts; one in which there was too much cement purchased and the other in which there was no job in existence, or one which had not been let to the purchaser.[6]

"WHAT I OBJECT TO IS HOLDING CEMENT IN MY BINS FOR THE DEALER * * * TO COMPETE WITH ME * * *"

Brobston, President of Hercules, examined by counsel for the Commission as to the effect of "loose cement" and "free cement" on prices, stated that he did not know of any such kind of cement.

> "Q. Do you mean to say that the purpose of tying up dealers on specific job contract, to a particular specified amount of cement, has had no connection with the question of price advances, or the maintenance of prices? A. No, sir; it has had nothing whatever to do with it, in my opinion. The reason for holding a man down to purchasing amounts that would really be used on a job is to prevent him from perpetrating a fraud on me by getting cement that is not to be used on that job at a price below my current market price.
>
> * * *
>
> A. If any cement is in the hands of the dealer at a lower price, that is perfectly all right. He has a right to do with that as he pleases. What I object to is holding cement in my bins for the dealer in a case where he will use it to compete with me at the new price which I put in. I have no objection to selling a hundred thousand barrels to a dealer if he will take it within 15 days and put it in his warehouse, or wherever he wants.

[5] (R) Tr. 26798-801.

[6] (R) Tr. 36499.

Q. And compete with you at the new price, or even less than the new price? A. If he takes it and stores it he is at perfect liberty to use it as he pleases.'"[7]

3. NRA Code Provisions

[The Code, as approved November 27, 1933, contained in Article XII provision that all future sales orders and contracts should "contain a definite statement of price, quantities, terms of payment, time and place of delivery and all other terms of sale necessary to form a complete and unambiguous contract."[1] The Code was accompanied by a suggested form of specific sales order and specific sales contract, which provided *inter alia*:

In Exhibit C, a suggested form of future specific sales contract appended to the NRA Code, it was provided:

[Italicized part quoted in Fdgs. Par. Seven (p) and (q) and Par. Thirteen (f)]

"Description and quantity.—The purpose of this contract is to cover the purchase and sale of all the Portland Cement required to complete the work herembefore described, whether more or less than the quantity stated herein.

Buyer represents that the aforesaid number of barrels of cement will be used in the construction of the above-described work and agrees that no portion of such cement will be used for any other purpose without the written consent of Seller. If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other

[7] (R) Tr. 26452-55.

[1] Com. Ex. 557, p. 342.

purpose than the purpose above specified; Buyer remaining liable for all unpaid accounts.'"[2]

The revised Code, which was in effect for only six days, provided in Article VIII, relating to open price filing, that members of the industry should file with the Code Authority "a copy of every contract or order by which he sells or undertakes to sell products of the industry" and provided further that the Code Authority should "send digests thereof to all interested Members of the Industry."[3]

Writing to Reiter on October 30, 1935, Neylan, Vice President of Lone Star, pointed out that consideration for the option in a specific sales contract might be defeated by an assignment by the purchaser. He wrote:

> "Referring to copy of your letter of October 25th addressed to Mr. Storey and to which was attached copy of letter from Mr. T. J. McFadden, Counsel, on the subject of specific sales orders.
>
> Of course you understand our company has added a clause which prevents assignment of the specific sales order. The purpose of calling this matter to your attention was to have all members of the industry understand just to what extent the specific sales order is likely to be manipulated and the reason this was brought to your attention is due to the fact that such assignment was threatened in the Eastern District only a short time ago.
>
> It is my feeling that copies of this correspondence should be sent to all interested members of the Cement Institute in order that they may protect themselves if they so desire."[4]

Following this Storey, Chairman of the Institute Committee on Forms and Contracts, circularized the members on November 14, 1935, advising them:

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[2] Com. Ex. 557, p. 349.

[3] Com. Ex. 560, p. 15.

[4] Com. Ex. 585 A.

"Our attention has been directed to the fact that the form of specific sales order, (Exhibit B of the Amended Code for the Cement Industry as approved on May 11, 1935), does not prevent assignment of such order, and if you are using this form and desire to prevent assignment we suggest the addition of some such clause as the following:

'No assignment of this agreement may be made by the Buyer.'"[5]

4. Provisions of Compendium

The Compendium of Established Terms and Marketing Methods approved by the trustees of the Institute in December, 1935 declared it to be an unfair trade practice "Knowingly to ship on a specific sales order or contract, Industry Products in amount in excess of actual requirements of the work therein covered;"[1] and in the attached form of Specific Sales Contract (Exhibit B) it set forth the provision against diversion, copied verbatim from the Appendix to the NRA Code, and quoted above.

5. Institute's Report and Checking Service

a. Nature of the Service

The Institute's Articles, as originally drawn, provided in Art. XIV, Sec. 2:

"CONTRACTS

A daily report shall be forwarded to the Institute by each member giving the following facts concerning the specific job contracts and other contracts for the future delivery of cement which have been made the preceding day, showing necessary details, that is:

Contracts sold by

Name of Purchaser

Name of Contractor

---

[5] Com. Ex. 200.

[1] Com. Ex. 561, p. 16.

Place of Delivery

Detailed description of work (including owner's name) upon which cement is purchased to be used

Number of barrels contracted for

Date of contract

Date of acceptance of contract

Contract number

Date of expiration.

This daily report shall also include a statement of cancellation and reinstatements of such contracts, and increases and decreases in the amount of cement called for by any such contracts, and such further information as may be required to identify the particular contract.

Each member shall also forward to the Institute, not later than the fifth day of each calendar month (or on such other dates as may be fixed by the Board of Trustees) a statement showing facts concerning the members' outstanding specific job contracts and other contracts for the future delivery of cement as of the last of the preceding month, which statement shall show as to each such contract all or part of the information listed above, as may be required by the Board of Trustees, including and in addition, barrels shipped for the month covered by the report, barrels shipped to date, and balance unshipped."[1]

The Trustees, at their meeting on October 29, 1929, resolved "that all contracts reported by members to the Institute were subject to checking by representatives of the Institute, preference as to order of checking to be given where a request for information was made by a member".[2]

In response to request by Commission's counsel for "a brief and comprehensive description of the activities of the

[1] Com. Ex. 138 J-K.

[2] Com. Ex. 136 Q; Reiter (C) Tr. 16777-78.

Institute in regard to the checking of specific job contracts", within his experience, the witness Reiter testified:

> "A. * * * I will testify as to what we did in the Chicago division, with which I am most familiar.
>
> Q. All right. A. Upon forms provided by the Cement Institute all members reported closed contracts for the future delivery of Portland cement daily to the Cement Institute.
>
> And after once having reported these contracts, on other forms provided they reported changes in the contracts, such as completion, increases in amount, decreases in amount, and so forth, the summary of this information so furnished daily by members of the industry was sent out on a form which was mimeographed in the Cement Institute office to all members in that division.
>
> The information furnished on this form regarding these contracts included the date of the contract, the quantity required, the expiration date of the contract, the name of the buyer, and if a dealer, the name of the contractor and a description of the work, but not the price at which this contract was sold.
>
> Examiner Norwood: But not what?
>
> The Witness: The price at which the contract was sold.
>
> We had in the Chicago division a varying number of field engineers, who furnished in substance the information which the manufacturers filed with us, went out in the field and actually checked these contracts to find out, first, whether they actually existed, and whether the contract required the amount of cement for which it was covered by contract.
>
> These field reports of the engineers were sent to the Cement Institute, and a corresponding report made to the member of the industry who owned that contract, giving him the essence of the information collected by our field engineers.
>
> A member of the industry could inquire on a form provided regarding the status of a competitor's contract which he found listed on the daily sheet. And in that case after the field check we sent him a copy

of the same report that was made to the member owning the contract.

Once a month we made a comprehensive report of all live contracts in our files, which stated the original quantity of cement, covered the amount already shipped, and which information we got from the members themselves once a month, and the unfilled commitments listing each contract separately, and summarizing the information on the first sheet of this rather large report.

We compiled certain statistics from this information, such as the various uses of cement covered by these contracts, and the percentage of the whole.

I believe, Mr. Wooden, that gives you a pretty complete picture.

By Mr. Wooden:

Q. Now, was there any filing or checking of contracts other than your specific job contracts? A. For this purpose we call them all specific job contracts, but there were also requirement contracts, such as the requirements of products plants, and so forth. Those were the only other contracts which were closed by cement companies.

Q. Were they checked in the same way as the specific job contracts? A. Yes, sir. They were somewhat more difficult to check, because an estimate was required by someone.

We were satisfied with the estimate of our engineers, and others had different estimates.

Q. Sometimes were those general requirements contracts held by dealers who also had specific job contracts? A. Yes, sir. Now, you mean were they sold through dealers, or was the user the dealer himself?

Q. I meant the latter. A. Yes, sometimes that was true.

Q. Were there some cases of concrete block producers, for instance, who were also dealers in cement? A. Yes, sir.

Q. There would be a difficulty in knowing or finding out whether the cement was for use in the making of concrete blocks, for instance, or for resale as

cement? Wouldn't that be true? A. Yes. My field engineers were under instructions to solicit no information from dealers, except in such a case where there was no one else to go to, except that our man could get certain definite information.

He knew block plants, and how much they could produce.

He would walk out in their plant and by seeing certain machinery at least he knew the maximum cement that they could use in that plant, and seeing their stock of blocks, and talking to them about orders he could make a fairly accurate estimate even in that case of cement which would be used.

Q. The checking of specific job contracts, was that done wholly through information obtained or solicited from the buyer of the cement? A. We checked specific job contracts through the contractor, the architect, the engineer and the owner, or two or more of them.'"[3]

Reiter testified that all actually closed specific job and requirement contracts for the future delivery of cement were checked. In reporting such contracts the price and the type of package were not reported but changes in status of the contract were reported such as an increase or decrease in the amount of cement, the expiration date and cancellations.[4] There was no report of potential or anticipated contracts or contracts for delivery within fifteen days. The latter represent over 50% of cement sold.[5]

b. Report Forms

The witness then explained the forms used by the Institute for the conduct of the contract reporting and checking service. In brief, these were as follows:

Form No. 1 used by members to report all contracts for delivery beyond 15 days of date of sale.

[3] Reiter, Manager Chicago Division (C) Tr. 4195-200.

[4] (C) Tr. 16753-54.

[5] (C) Tr. 16748.

The information required included company name; contract serial number; date that member signed or approved the contract; contract date; contract expiration date; quantity, destination and type of delivery; name and address of buyer; contractor and owner and description and location of work.[1]

Form No. 2 to be used by a member for reporting daily changes in status of contracts, *i.e.*, completion, cancellation, increase in quantity and balance due.[2]

Form No. 3 used by the Institute in sending to members a daily compilation of the information reported by members on Forms Nos. 1 and 2.[3]

Form No. 4 to be used by members to request a checking of a competitor's contract and on which he gave whatever information he had bearing on the contract which would be of interest in connection with the check.[4]

Form No. 5 to be used by the field checker in recording the information received upon his investigation.[5]

Form No. 6 used by the Institute in reporting to members the information collected in the field on a competitive contract in response to request for information.[6]

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[1] Resp. Ex. 2644.

[2] Com. Ex. 1013 B.

[3] Resp. Ex. 128 A-C.

[4] Resp. Ex. 138.

[5] Resp. Ex. 139.

[6] Resp. Ex. 142; Com. Ex. 1017 C: The Institute to Standard, dated April 6, 1936.

Form No. 7 used by the Institute in reporting to members generally information collected in the field by field checks.[7]

Form No. 8 to be used by the recipient in commenting on information received on Forms Nos. 6 and 7.[8]

Form No. 13 used for compilation of unshipped balances under contract on the last day of the month.[9]

Each member company had a distinctive number and the Institute reports identified its contracts by its number instead of its name. Brevity was the only object of this method.[10]

In 1935 a member raised the question as to reported verbal contracts and the trustees disposed of the matter by a resolution "that Specific Sales Contracts or Specific Sales Orders are to be filed with The Cement Institute only after such contracts or orders have been signed by the purchaser."[11]

c. Field Checking

Contract checking was generally and preferably conducted by engineers employed by the Institute and particularly trained for the service. However, the Chicago division when the service began was without sufficient trained personnel and borrowed salesmen from cement

[7] Resp. Ex. 141; Com. Ex. 1017 A: The Institute to Castalia, dated March 21, 1936.

[8] Resp. Ex. 140; Com. Ex. 1017 B: Castalia to The Institute, dated March 23, 1936.

[9] Resp. Exs. 131, 132.

[10] Reiter, Manager Chicago Division (C) Tr. 16757.

[11] Com. Ex. 622 E: Trustees' Minutes, February 14, 1935.

companies, assigning them for checking contracts in territories which they had not usually worked as salesmen.[1]

Reiter testified:

> "In 1930 we had some 7500 contracts filed with us, and borrowed a number of men from cement companies to make the initial check.
>
> It finally worked down to a regular corps of some 10 or 11 engineers. It varied according to the contract on file."[2]

In all some fifty-five salesmen were borrowed for a period of two weeks to work in the Chicago division office.[3]

Field representatives engaged in the checking of contracts, operated under written instructions as follows:

> "The general purpose of The Cement Institute as set forth in the Articles of the Association are to promote the best interests of the cement industry by providing facilities for collecting, through voluntary action, information with respect to trade and commerce therein, and by disseminating such information among members of The Institute and the public generally. The information so collected and disseminated in part consists of information concerning actually closed specific job contracts and other contracts for the future delivery of Portland cement, and to this part of our work you are assigned.
>
> The members of The Institute desire to have accurate facts and information concerning their obligations to ship under contracts with their customers, so that they may intelligently guide sales and

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[1] Reiter, Manager Chicago Division (C) Tr. 16772.
Com. Ex. 2198: Memo dated February 11, 1930, Irvin of The Institute to Members of The Institute.
Com. Ex. 2199: Letter dated February 20, 1930, Reiter, Manager Chicago Division to Cabanis, Sales Manager, Northwestern States.

[2] (C) Tr. 4228.

[3] Reiter, *supra*, Tr. 16771.

manufacturing operations. Incorrect information might easily cause a manufacturer to suffer a great loss and your purpose in The Institute is to secure the most accurate information obtainable.

In giving you a contract to investigate, certain information is furnished you, including the name of the purchaser—a building material dealer, in most cases and the name of the contractor doing the work. You may show this letter to all interested parties and no person to whom you talk need fear that information given you will be misused or abused.

Those on whom you call may desire to communicate with this office, or with the member company with whom they are doing business. They should be encouraged to do this if they wish. A list of members of The Cement Institute is attached to this letter.

As a matter of information, the facts as ascertained by your investigation are transmitted to interested members of the Institute for their guidance. Each member uses the facts as he sees fit.

I want to impress upon you the necessity for courtesy and tact accompanied by intelligent persistence in your search for reliable information."[4]

Reporting to the Advisory Committee of the Chicago Division on July 22, 1930 Reiter stated, *inter alia*:

"Our field engineers report that there is little antagonism toward them in the field on the part of the larger contractors and dealers although there are some definite rebuffs in our efforts to secure necessary information. Our engineers report an increasing tendency on the part of such large contractors and dealers to cooperate with us in securing correct information, evidently in the belief that the members of this Institute are entitled to complete information on a matter of business fairness. Our field engineers also report to us, in many instances, commendation of the purposes of The Cement Institute when explained to purchasers."[5]

[4] Resp. Ex. 2417 A: Letter dated February 5, 1930, Reiter, Manager Chicago Division to Field Representatives.

[5] Com. Ex. 137 S.

Evidence of hostility to field checking is shown in a letter written in April, 1931 by one Houser, a salesman of Lehigh, to Bowen, Vice President of Lehigh, in which Houser wrote:

> "Last week I spent Monday and Tuesday in Savannah, Georgia and had one continuous argument with our dealer, W. J. Bremer, who has ordered nothing from us since November last. As you doubtless know, Bremer is very peculiar and demands a lot of attention which I have not had time to give him but from now on think I can arrange to see him about every other month. His main argument for not buying from us recently was the fact that the Cement Institute representative came to Savannah, checked up on Bremer's contracts without seeing Bremer, and the result was that our contract with him covering the Art Stone Company work was cancelled, while the contracts of Penn-Dixie and Lone Star were left in force. Bremer admitted that he had covered this work for more cement than was needed but took exception to the 'police' methods used especially by ourselves and inasmuch as his contracts are four cents lower than the present market price and have until July to run, I do not think that we will get much, or any warehouse business from him before that time."[6]

Hogan, Vice President of Lone Star, made the same point in a general way when he wrote on March 29, 1934 to Affleck, Chairman of the Committee on Public Relations of the Institute, in reference to criticism of the industry by dealers and the public. He wrote:

[Italicised part quoted in Pdgs. Par. Twenty-one (c)]

"*Lack of a binding contract.*

Because a specific job contract is not a contract but an option to buy, duplication of bookings giving rise to the checking of contracts has in many instances proved annoying to purchasers. The misunderstandings and unpleasantness which accom-

[6] Com. Ex. 1018 B.

panies a price change and the complicated rulings with which we have surrounded the marketing of cement both have their origin in the failure to provide a contract that is binding.'[7]

d. Districts and Periods in which the Service was rendered

The evidence digested below is shown graphically on the Chart on page 1876.

Contract checking began on November 1, 1929 for the Northeastern division.[8] On January 1, 1930 this was extended to cover the Southeastern division. On April 8 the Southeastern division opened its own office and its service was transferred to Chattanooga.[2] The division office in Chicago began contract checking on February 3, 1930 and about the same time the Kansas City office began this service.[3]

The service was discontinued at Kansas City and Chattanooga early in 1931 when these division offices were closed and the service was abandoned at Chicago and New York in May 1931 in conformity with the general contraction of the activities of the Institute at that time.[4]

Upon the reorganization of the Institute in June 1933 the trustees authorized the resumption of services along the lines followed during 1929 and 1930. Divisional offices were reopened, contract reporting began again in New York

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[7] Com. Ex. 553 Z.

[1] Resp. Ex. 143 A-D: Letter dated November 1, 1930, McConnell, General Manager, to Members.

[2] Id.

[3] Com. Ex. 137 G-P: Report of Manager, The Institute, dated April 8, 1930.
Com. Ex. 137 R-V: Report dated July 22, 1930, Reiter, Manager, The Institute to Advisory Committee.
Reiter, Manager Chicago Division (C) Tr. 4195-96.

[4] Reiter, *supra*, Tr. 4195-96.

in July 1933, in Chicago on August 1, 1933 and at Kansas City in January 1934. The Southeastern division office was not reopened. In October 1934 members of District 6 in that area requested the Chicago Division office to handle reporting and dissemination of contract information for that district and the service began on November 1, 1934.[5]

At their meeting in Chicago on December 9, 1935 at which they terminated the activity of the Trade Practice Committee, the Trustees passed a resolution limiting the future activities of the Institute, wherein they provided for "Whatever agencies may be necessary to handle filing and checking contracts (paid by Special Division dues)".[6]

The service continued to function in the New York, Chicago, and Kansas City offices until September 1936 when it was discontinued by order of the Board of Trustees in conformity with the general program of retrenchment.[7] Contract reporting and checking was not subsequently revived.[8]

The Institute never rendered a contract reporting service on the Pacific coast.[9]

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[5] Reiter, Manager Chicago Division (C) Tr. 16730; Resp. Ex. 136 A-B.

[6] Com. Ex. 624 D: Trustees Minutes.

[7] Reiter, *supra*, Tr. 4195-96, 4234-35, 4530, 16732, 16745-46, 16792, 17144.
Com. Ex. 626 C, D: Minutes of Trustees' Meeting, 9/10/36.

[8] Reiter, *supra*, Tr. 4234-35, 16792.

[9] Reiter, *supra*, Tr. 2809, 16710-11.
California: Duque, Vice President (C) Tr. 42447.
Northwestern Portland: Hollister, President (R) Tr. 48116-17.
Superior Portland: Tongue, Secretary (C) Tr. 42894-95.

6. Use Made of Institute's Services

a. Extent of Cancellation of Padded and Duplicated Contracts

The problem of a padded or fictitious specific job contract was one that concerned only a single company whereas duplicated contracts concerned more than one company. As to the extent of each of these types Reiter, former Manager of the Chicago Division, testified that:

> "* * * ordinarily only a small percentage of contracts are duplicated. As I say, most of the information developed which resulted in cancellation or partial cancellation of contracts was in padding or in imaginary or completed contracts which we found in the field * * *."[1]

In Districts 1 and 2 reporting of specific job contracts began November 1, 1929 and at an Institute meeting on January 8, 1930 in Chicago, the President reported that in the northeast since November 1 the Institute

> "* * * had furnished information to members which had enabled them to cancel more than 6,000,000 barrels of overestimated, duplicated, and fictitious contracts."[2]

The work of reporting in the Chicago Division, covering Districts 3, 4, 5 and 7, began on February 1, 1930 and on April 8, some two months later, Reiter reported to members of the Chicago Division:

> "The filing in this office of contracts appearing on members' books as of January 31st proceeded as rapidly as possible after February 1st, and when this data was considered reasonably complete, a report (Form No. 13) was prepared, upon which all such contracts were listed, and this report was mailed to members on March 28th. A supplementary report

[1] (C) Tr. 16777-78, 4236.

[2] Com. Ex. 137 A: Members' Minutes.

on Form No. 13 and a summary of balances unshipped was prepared and mailed April 4th. Contracts on members' books as of January 31st, and reported to this office before April 1st, totaled 3,213, and the total unshipped balance on these contracts was 14,796,325¾ barrels."[3]

In the same report Reiter stated that during February and March total cancellations of 549,000 barrels were filed with the office and he expected that these would greatly increase within a short period.[4]

G. E. Pierson, Vice President of Lone Star of Indiana, writing Hogan on April 28, 1930 stated:

[Italicized part quoted in Fdgs. Par. Thirteen (e)]

"I attended a meeting of the Cement Institute in Chicago on Wednesday and Thursday of last week. This meeting was called primarily to give consideration to the duplicated contracts and excessive commitments as applies to concrete products plants' yearly requirements.

The meeting was well attended, the spirit of the meeting was fine, most everyone there expressed willingness and a desire to eliminate as quickly as possible surplus bookings wherever they may exist.

At our former meeting held two weeks ago a report was made by the secretary indicating that cancellations up to that time totaled approximately 500,000 barrels. The report at the last meeting indicated subsequent to that time and prior to the last meeting additional cancellations totaling 1,050,000 barrels had been made. During the two-day conference in Chicago it was estimated that cancellations approximating 500,000 barrels were made. There remains additional duplicated bookings to be eliminated and it looks on the face of it at this writing

[3] Com. Ex. 137 G-H.

[4] Com. Ex. 137 J.
Com. Ex. 1018 A: Pierson to Hogan, Lone Star, dated April 28, 1930, confirms this.

that when the slate is finally cleaned there will have been canceled somewhere in the neighborhood of 2,500,000 barrels. This, I think, speaks well for the work of The Institute and indicates very definitely just how effective this work can be made if it is properly supported by the membership.'"[5]

Some three months later, on July 22, 1930, Reiter reported to the Advisory Committee of the Chicago Division and stated:

> "The total cancellations to date are 4,000,000 barrels, and if direct sales to highway departments are not considered this represents a cancellation of approximately 33% of the balance. There has apparently been a large cancellation also by some non-members."[6]

Pierson, of Lone Star, reporting to Hogan of the same company on July 24, 1930 on the same meeting of the Chicago Division, wrote in part:

> "• • • Total cancellations from February 1 to July 15, inclusive, total approximately 3,917,000 barrels. We were informed that non-member companies have indicated cancellations in excess of 500,000 barrels."[7]

During the second period from July 1933 to September 1936, when the Institute again maintained a specific job contract reporting service, the following reports for the Chicago Division and the Northeastern Division are in evidence:

CHICAGO DIVISION: For the period between August 1, 1933 and November 1, 1934 Reiter reported that as of October 1 a total of 9,975 contracts had been filed covering total

[5] Com. Ex. 1018 A.

[6] Com. Ex. 137 S.

[7] Com. Ex. 635 A-B.

commitments of 26,482,364 barrels and that cancellations of this total commitment (after taking account of increases and reinstatements) made a net reduction of 3,742,908 barrels, being 14% of the original commitments or 17% of shipments on such contracts.[8]

NORTHEASTERN DIVISION: A recapitulation of contract information filed during the nine months ending September 30, 1935 shows cancellations of 3,379,164 barrels.[9]

b. Institute Policy as to Use of Information

On this subject Reiter, former Manager of the Chicago Division and later Secretary of the Institute testified:

> "Trial Examiner Norwood: In case where it is found that there was duplication what did the Cement Institute do about it?
>
> The Witness: They did nothing except to report whatever information the field engineer checked in the field; sometimes a check, Your Honor, would tell him that he purposed to use a certain brand of cement. When that was told him he reported it to us and we reported it to all members owning contracts duplicated on that job."[1]

and further:

> "Q. Now, was it, and did you consider it as such as being any concern of the Institute whether or not member companies relayed information contained in the daily summaries to their salesmen? A. No; it was no concern of The Cement Institute whether or not they did so.
>
> Q. Well, were member companies obligated in any way to send on information contained in this form 3 to their men in the field? A. They were not obligated to do so; no, sir.

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[8] Resp. Ex. 126 A-B.

[9] Resp. Ex. 2139.

[1] (C) Tr. 16774.

Q. Did The Cement Institute have any authority in any way with reference to the contract obligations of its members? A. No."[2]

* * *

"The Cement Institute, to my knowledge, took no action of any kind to cause or persuade any member of the Institute to either cancel or refrain from cancelling any contract.—"[3]

When Letzkus, Sales Manager of Pittsburgh, addressed the Manager of the Institute on March 12, 1936 asking whether it would be "out of order to have the Institute send direct to our salesmen the daily Institute sheet on summary of contracts received", and pointing out that this would save him a lot of work in picking out information which he wished to put in the hands of his salesman,[4] the Manager replied:

[Italicized part quoted in Fdgs. Par. Thirteen (g)]

"I am afraid that it is out of order to send copies of our Daily Report to salesmen and this has never been done. The reason is that we merely send to members in this manner information for their guidance, and it is the usual practice for member companies to forward a part of this information to field men without identifying it as coming from the Cement Institute. The purpose of this procedure is to indicate the fact that the company itself is responsible for information furnished salesmen and also to avoid the implication that the Cement Institute has any authority in the control of contract obligations."[5]

There was evidence as to the information reported to members by the Institute. On this subject, counsel for the

[2] (C) Tr. 16756-57.

[3] (C) Tr. 16787.

[4] Com. Ex. 1931.

[5] Com. Ex. 1932.

Commission examined Reiter on a report to Louisville dated July 23, 1935 concerning a contract to furnish 500 barrels to a firm in Cincinnati for a job at a specific address. The report stated that the type of building called for in the contract at the address indicated had been completed in 1929, that a new building of similar type was being erected a few street numbers away but that an entirely different contractor had that job. The report added:

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

> *"We, therefore, believe that no obligation exists under this contract for cement."*[6]

Reiter had testified that the Institute did not advise members as to their contract obligations and counsel for the Commission asked him about this statement. Reiter replied:

> "Yes, and that statement was put in this shape. that 'We see no obligation' or 'We see no further obligation under this contract,' and that was preceded by the complete report of the facts which our engineer found in the field."[7]

Returning to the subject, counsel asked if the Institute gave similar advice in other divisions regarding absence of obligation to fill a contract where there was a duplication. Reiter answered:

> "Well I do not consider that advice. I consider it an opinion of ours based on the facts stated ahead of that statement."[8]

A communication of like tenor is one to Kosmos on May 28, 1936 by Foster, Acting Manager of the Chicago Division, who reported on certain contracts let for a WPA

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[6] Com. Ex. 1015 A.

[7] (C) Tr. 4224.

[8] (C) Tr. 4227.

project at Memphis, Tenn. After setting forth the facts as found by a field check the communication continued:

> "We, therefore, repeat that we see no further obligation under any of these contracts.
>
> If your information on the above contract does not agree with the above, we shall be glad to have you so advise with whatever facts you care to give us, using the attached form No. 8 for your convenience."[9]

Following the expiration of the Code, but while the industry was still under the admonition to give voluntary effect to its provisions, Reiter, as Chairman of the Trade Practice Committee, wrote to Wabash on July 22, 1935, referring to a contract covering the partial requirements of Indiana State Highway Contract for 15,000 barrels and then continued:

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

> *"The unshipped balance on this contract as of June 30 was 6,538½ barrels and member owning this contract states that they are not shipping at this time and believe that Wabash cement is being furnished.*
>
> *We find no contract of your company covering this project and inasmuch as there have been raises in price since this contract was awarded we are investigating this matter and request that you advise whether or not you have a contract covering a portion of these requirements and have failed to file it with this office as required by Section 7, Article VIII of the Amended Code.*
>
> *Please make reply within five days of receipt of this letter."*[10]

The disparity existing between contract commitments and actual needs for specific jobs is illustrated by a report on three contracts held by Louisville. Concerning one of

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[9] Com. Ex. 1015 D.

[10] Com. Ex. 1014.

these an interoffice memorandum, dated August 22, 1935, by the manager of the Louisville plant at Speed, Indiana, states:

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

"I am enclosing a letter from Bass & Co. asking us to extend the expiration date on the 1000 barrel contract for the W. B. Hudson job from Sept. 1st to December 1st. I don't know just what to do about this. Representatives of other cement companies have been investigating the three contracts we have at Clarksville and reporting to the Institute that these contracts are not legitimate and that they will require a great deal less cement than the contracts call for. The Institute has been questioning the validity of these contracts. We are on the spot concerning them.

We do not want to ruin our reputation for fair dealing in the industry, but on the other hand we want to be absolutely fair with Bass & Co. at Clarksville. We want to supply on these contracts every barrel of cement that is necessary to fill them, and if it is necessary to extend the expiration date on the W. B. Hudson contract to December 1st in order to do so, then we are perfectly willing to make this extension."[11]

The report on these three contracts sent by the Institute to Louisville on September 24, 1935 on Institute Form No. 7 shows as follows:

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

"We have had our engineer check contract indicated below. The facts as reported to us are given for your information.

Sellers No.	Quantity	Sold F.O.B.	Purchaser
63/416	500	Clarksville, Tenn.	Bass & Co.
63/417 (compl.)	1,000	"	"
63/418 (compl.)	250	"	"

Description and Location Construction various residences

[11] Com. Ex. 1015 B.

We have received additional information on the above contracts as follows:

'On Contract 63/417, which shows completed, having shipped 1,000 barrels. Part of the cement on this job was furnished by another dealer the Merritt Stave Company and the entire job took about 50 barrels.

On Contract 63/416 on which they show shipped 211 barrels. There has only been two of these houses built, which consumed approximately 25 barrels.

On Contract 63/418 on which they show 250 barrels shipped. Another dealer at Clarksville, Manning & Orgain Supply Company supplied all the cement on this job, which took about 70 barrels.

[Italicised part quoted in Fdgs. Par. Thirteen (f)]

It is our information that Bass & Company are furnishing this cement at the old price on the Post Office job at Clarksville, so naturally they were able to undersell other dealers, as this was bought at a lower price on these fictitious contracts.

May we have your understanding?
CC: M.C. MONDAY,
TRUSTEE-DISTRICT 6

(Pencil notation)
answered 9/26 — 63/416 now closed. 417-418 previously reported as closed.

If your information on the above contract does not agree with the above, we shall be glad to have you so advise with whatever facts you care to give us, using the attached form No. 8 for your convenience.'[12]

There was evidence in the record that in 1930 some members of the Institute had been annoyed by the failure of Kosmos to enter the Institute and submit its contracts for checking against duplication. Examined as to whether any pressure had been brought upon that company on this point, the witness Horner, President of Kosmos, testified:

"Q. Will you tell us whether or not The Cement Institute ever brought pressure to bear upon the

[12] Com. Ex. 1015 C.

Kosmos Company with reference to contract reporting in April, 1930, prior to your joining the Institute? A. No, I am sure that there was no pressure brought. I think we were requested to join the Institute once or twice in there. Just in what form, whether by letter or not, I do not recall.

Q. But you did not join; did you? A. I did not join."[13]

MacDonald, Vice President of Northwestern States, questioned as to the handling of duplication testified:

"Q. Well, where contracts were duplicated, did the Cement Institute, to your knowledge, ever concern itself with which contracts should be canceled? A. They did not.

Q. And did you ever have any agreement with any of your competitors with regard to this matter of cancellation of contracts? A. No, sir."[14]

c. Use of Information by Companies

Describing his experience with duplicated contracts and cancellations, Reiter testified:

"Q. Did you find any number of locations that specific job contracts were duplicated, that is that several mills, or more than one mill had contracts for the same specific job? A. Indeed we did.

Q. Were a number of such contracts cancelled? A. They were of course, having been over-bought, cancelled.

But I want to make it plain that in all of this work I don't know of any case where the buyer was not left with sufficient cement to cover the work which he had under contract.

But where a buyer had bought the total quantity from three or four different cement companies quite frequently three of the four companies cancelled their contract, or the total amount at any rate was reduced to the total requirement.

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[13] (R) Tr. 36980.

[14] (R) Tr. 36497.

Q. Upon a report showing the situation as the result of your checking? A. Yes, sir, I assume so.

Q. How was it determined which one should do the cancelling? A. Mr. Wooden, we had some amusing instances, where that condition existed.

We will say four cement companies had the total requirements of a certain contract through a dealer, and the representatives of each of those four cement companies went to this dealer and said, 'Well, now, we happened to know that you have got this cement bought elsewhere as well as with us, and we don't want you to kid us, we have to know what our commitments are, and so will you tell us whether you intend to ship this cement from us or not?'

And to each of those four representatives of different companies this buyer would say, 'Well, that is true, I have got it bought from three other companies, but I am going to cancel theirs and take yours.'

But when a representative of the Cement Institute, who was a neutral party, and had no sales interest in the problem, asked the same question, the buyer had to tell him something that indicated where he was going to buy his cement, that is, unless he refused to tell him anything.

Q. Did you have some difficulty in the way of refusals on the part of buyers to give your inspectors information? A. Very rarely. We tried to teach diplomacy to our field engineers and instructed them to tell the buyer in each case who they were and why they were checking the contracts. The buyers believed that it was a business-like matter and rarely objected to giving information to our inspectors.

Q. And what was the interest of the buyer in having his contracts for specific jobs duplicated in that way? A. Sometimes the buyer was friendly to several different cement salesmen and it was merely a friendly gesture. He did not want to turn anybody down on his order. In other cases, it cost him nothing to do this, and if the dealer—if the price of cement should happen to go up he would secure cement at a low price to which he was not entitled by virtue of his contract which he could supply on other work than that covered by the contract.'[1]

[1] Reiter, General Manager, Institute (C) Tr. 4200-03.

and further:

> "A. I do not know as to disputes between members, but a marked difference of opinion sometimes occurred by their replies to our reports.
>
> Q. What principles determined the settlement of such differences of opinion? A. So far as I was concerned, the statement of the user of that cement to our field engineer. To make that clear, if the contract was for 10,000 barrels and there were three cement companies which had a contract for 5,000 barrels—I should have said if the requirements were 10,000 barrels and the user told us that he was going to take 5,000 barrels of Brand A and Brand B, we would so report it in the contract. If Brand C having a 5,000 barrel contract was entirely out, that looked all right to us, but that did not always occur.
>
> Q. Did the question of priority or time of making of contracts enter into it? A. Yes. In our reports by the nature of the form, the date of the contract was, I believe, always given or, at least, it was referenced so that they could, from information which the Cement Institute had already furnished, find the date of the contract.
>
> Q. Was the earliest date of the contract determinative of which one was entitled to fill the contract? A. I would say from returns of reports to the Cement Institute that some sometimes considered it that way and some gave it very little consideration."[2]

On a number of occasions the evidence shows that members brought information received from the Institute of duplication of specific job contracts to Institute or Division meetings and acted upon them on those occasions.

In March, 1930 Hogan, Eastern Sales Manager of Lone Star, in a memorandum on a meeting of the Board of Trustees of the Cement Institute on March 8, 1930 in New York stated:

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[2] (C) Tr. 4225-26.

[Italicized part quoted in Fdgs. Par. Thirteen (e)]

"The principal subject discussed was the matter of checking contracts and cancelling any that were found to be without proper supporting evidence.

It developed that the work of the Institute so far has proved quite helpful and that a great many false contracts have been cancelled. It was the consensus of opinion of all those present that the good work should be continued and remaining false contracts cancelled out, if possible."[3]

Jennings, Sales Manager of Southwestern, wrote to its President on April 29, 1930 as follows:

[Italicized part quoted in Fdgs. Par. Thirteen (e)]

"I spent last Wednesday and Thursday in Chicago at a meeting of the Cement Institute. Each cement company representative took his contracts with him to Chicago, and it took us two days to go over all of these different contracts and cancel the duplicates and come to an agreement among the different ones on what they were willing to do.

On Wednesday morning when we got in there everybody was feeling in an antagonistic frame of mind. Things were being done by Universal, Speed and our friend Harry Jennings and a few others that were contrary to the ethics of the Cement Institute, and some of the rest of the boys were up in arms about it and it looked as if some of them were going out and take the business regardless. But we got them all together again and by working with them they came back prepared to carry on a little bit longer."[4]

Bretherton, Sales Manager of Allentown, wrote Weaver, President of that company, on July 7, 1930, enclosing a resume of the contracts in the Philadelphia territory and the unshipped balance of old contracts after cancellations were made by the manufacturers holding these contracts. Bretherton stated:

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[3] Com. Ex. 604 A.

[4] Com. Ex. 1270 K-L.

"While the companies had been requested to bring this information, only two had brought the amount of their complete totals. The writer told Mr. McConnell that, as it was our understanding, and a request had been made to all the companies to have this information available at the time of the meeting, that we felt it should be worked out while we were all together. This was done and the attached sheet is the result."[5]

Companies in the Kansas City Division were reluctant to do anything about the duplications and padding revealed in the Institute information. The correspondence in evidence between Baxter McClain, Manager of the Kansas City Bureau, and McConnell, General Manager of the Institute follows. On May 3, 1930 McClain wrote to McConnell:

"I am rather disappointed at the reaction of the members to the disposition of contracts as booked, especially in the larger cities; for they seem to be unwilling to get rid of any prospective business—and to add to the perplexity of the situation, the Ready-Mix situation and the commitment developments that are more or less problematical seem to be our chief stumbling block."[6]

On May 10, 1930 McClain wrote McConnell:

"In compliance with your request for a weekly letter in regard to checking progress, will say that since completing the check of Kansas City, we have been laboring with the members here to get rid of their excess and undesirable contracts—with no perceptible success, until the last day or so. I believe that some of them have the initiative to go out and start this thing so far as their companies are concerned and that is really all that is necessary to bring results. Owing to the peculiar situation with Ready-Mix and practically one dominant dealer, it

[5] Com. Ex. 1429 A-L.

[6] Com. Ex. 141 (27).

was difficult to get some member to take the iniative and it is hoped that by this time next week, we can make you a more encouraging report."[7]

Further on August 2, 1930 McClain wrote McConnell:

"General conditions, as to commitments at the end of July showed the results of my work here during the past six months of the most trying experience, under the most adverse odds, that I have ever had—or known another to have; but over half of the spurious contracts taken during the 'rush' have been eliminated, and more than fifty percent of the unshipped commitments (exclusive of highway contracts) are upon the new market.

Tulsa is in fairly good condition as to contracts, but ultimate results are impossible as long as the trucking proposition exists.

Wichita is back in the old dealer squabble, with some loose old cement hard to locate but demoralizing in effect."[8]

Executives of a few companies testified as to how they handled duplications.

Alexander, President of Missouri, testified:

"A. When we were advised there was a duplication we immediately called on the purchaser and made an effort to secure shipping instructions or assurances that we would ship the cement. In cases where we were advised that no contract existed, we made a further check of the situation ourselves to see, satisfy ourselves that there was no such contract requirements.

Q. In cases where duplication was found to exist, how was it determined which cement manufacturer was to cancel its contract or did cancel it? A. It was determined by the purchaser, as far as we were concerned."[9]

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[7] Com. Ex. 141 (63).

[8] Com. Ex. 141 (65).

[9] (R) Tr. 37240-41.

He further denied that his company had any agreement with any competitor in regard to the cancellation of contracts and that his company had ever instructed any of its salesmen that the Institute had anything to do with cancellations of duplications or padded contracts.[10]

G. E. Warren, Vice President of Southwestern, examined as to his company's handling of duplications testified:

> "Q. Now, when you found any duplication in specific job contracts between your company and some competing company, will you tell us whether or not you agreed with those companies as to which ones should cancel their contracts? A. No. We try to find out from our customers what quantity of our product he would agree to ship.
>
> Q. Did you ever agree with any competitor in the case of a duplication of contracts? A. No."[11]

MacDonald, Vice President of Northwestern States, denied that his company ever had any agreement with competitors with regard to the cancellation of contracts.[12]

Hoenig, Manager of Nebraska, denying any agreement as to cancellation, testified:

> "Q. Just one question, Mr. Hoenig: In connection with this contract checking and these meetings that Mr. MacIntyre was asking you about, was there any cancellation of contracts by anybody on the occasion of such meetings, or how was that handled? A. No, the only satisfactory way was and practical way that we found to handle that was, to go back to the contractor. Nothing could be accomplished there excepting to get the information that each one of them had a contract and we found that each one of them got back to the contractor as quick as he could and attempted to re-commit him definitely.
>
> Mr. Werle: That is all.
>
> • • •
>
> A. Whoever got there first and sold it was successful.

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[10] (R) Tr. 37243.

[11] (R) Tr. 29160.

[12] (R) Tr. 36497.

By Mr. MacIntyre:

A. Well, on that point, Mr. Hoenig, do you mean to testify that at the meetings there was no expression at all on the point as to whether or not at least a part of the contracts should be considered for cancellation without binding yourself as to which one should be cancelled?

• • •

A. No, I don't think so. I think all that they required, that they discussed at those meetings, were the circumstances that led to getting the contract, and at times the evidence seemed to show that they really did not have a contract when they thought they had one. The salesman thought that he had committed the contractor when he had not, and somebody else was certain that he had them committed. Well, the result was that the only way they could be sure about it was to go back and get the final definite evidence from the contractor.

Q. Is it your testimony that the question of cancellation or even the word 'cancellation' was not taken up at the meeting?

Mr. Werle: Oh, I object to that.

A. I do not think so. I do not believe it would have done a particle of good. Any discussion of that kind, so far as I am concerned, would not have influenced me in the least. I would want to be the first one to get back and sell that cement.'"[13]

d. Value of Service

Several witnesses testified as to the value of the contract reporting service, especially for small companies. Thus, Letzkus, Sales Manager, Pittsburgh, testified:

"• • • when they were checking contracts, that was of big value to me, and saved us undoubtedly a lot of work, and effort and money, and that was one of the things that I liked best of all, because in going around following the job, where there are four or five, or six or eight or ten other cement companies, one of

[13] (R) Tr. 42176-78.

> them may get the order closed up. Then, or during the Code period, we would know that promptly. I have known of cases where some of our men have followed jobs for two months after they had been placed, and that was a very big help to us, and the checking of contracts at that time was another thing."[1]

When Letzkus learned that the contract checking service was to be stopped, he wrote The Cement Institute:

> "I regret this information very much, for I believe that the reporting of contracts has been of great importance, and with the discontinuance of this service, it seems to me that the Institute will really be of little value. I am inclined to think that there will be a great deal of duplication, overshipment of contracts, and will probably lead to a chaotic condition. I think that this service is something that should not have been discontinued unless there was some very good reason for it.
>
> With this service no longer available, it looks to me as if there isn't any use remaining as a member of The Cement Institute, and after considering the subject, I may find it necessary to resign."[2]

Alexander, President of Missouri, a single mill company, testified that the service was of distinct value.[3]

Warren, Vice President of Southwestern, in response to an inquiry as to the benefits received from Institute services, said:

> "* * * I placed value on the specific contracts reporting for the information there as a check on duplication of contracts * * *."[4]

Bates, Sales Manager of Federal, asked if he considered the contract reporting service to be of any value, replied:

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[1] (R) Tr. 37980.

[2] Resp. Ex. 2841.

[3] (R) Tr. 37243.

[4] (R) Tr. 29163.

"I certainly did; for a small company such as we are it saved us no end of time in learning and following contractors and learning what had happened to that particular order."[5]

7. Effect on Market Prices

[Italicized part quoted in Fdgs. Par. Thirteen (b)]

Counsel for the Commission, referring to a report by Reiter to the President of the Institute in which Reiter wrote: *"The Institute's present method of filing and reporting contract information is undoubtedly of less value than during the period of a rising market"*,[1] asked the witness to explain why that is the case. Reiter answered:

"If a number of contracts on a large quantity of cement were under contract at a market price and then the market raised and many of these contracts phony, or in error as to the quantity required, and no effort was made to confine the quantity of cement shipped under them to the actual requirements of the jobs covered by these contracts then the cement companies would furnish a large quantity of cement at less than their new and higher market price, contrary to the requirements of their contract, and therefore would not secure their higher market price on that quantity of cement."[2]

McClain, Manager of the Kansas City Division and formerly manager of the Kansas City Bureau, was examined on the stand as to his letter of August 2, 1930 to McConnell on the activities of the Division in regard to contract checking. In this letter McClain had written:

"Tulsa is in fairly good condition as to contracts, but ultimate results are impossible as long as the trucking proposition exists.

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[5] (R) Tr. 30725.

[1] Com. Ex. 595 E.

[2] (C) Tr. 4211-12.

Wichita is back in the old dealer squabble, with some loose old cement hard to locate but demoralizing in effect."[3]

McClain was asked what he meant by "loose, old cement" and he testified:

"A. That is too long ago to recall, but I assume that it was—by loose, old cement, cement that the origin of it I couldn't ascertain. I don't know as to who shipped it. I don't know that that is what I meant, but that would probably be what it was.

Q. What about loose, old cement in the hands of dealers or under contracts with manufacturers? A. I don't know. I really don't know what I mean by that, to be frank about it. It was so long ago. What date was that?

Q. August 2, 1930. A. Yes.

Q. How would loose, old cement have a demoralizing effect? A. As long as—it could have a demoralizing effect as long as there was cement existing that had been bought for a specific purpose and not used thereon, and at a lower rate, it would have a demoralizing effect on the market.

Q. Particularly if the market should show an advance? A. Yes, or even a stability, there would be an opportunity to handle loose cement there that was not tied up to any obligation."[4]

During the direct examination of MacDonald, Vice President of Northwestern States, the examination was interrupted by counsel for the Commission and upon being questioned by the Examiner as to the point counsel wished to make, he replied:

"Mr. McIntyre: We put in proof, and there is plenty of it in the record, to the effect that these Respondents entered into a combination to check contracts for the purpose of canceling out any con-

[3] Com. Ex. 141 (65).

[4] (C) Tr. 14421-22.

tract for cement that they felt would result in placing on the market cement purchased at a low price, or a price lower than the prevailing after a price advance a few months subsequent, and that they did take action in canceling out such contracts. There is plenty of that in the record. Denials by one or a dozen, of course, does not change that, but getting into conclusions as to types of contracts involved, if your Honor please.'"[5]

The objection was overruled and upon the resumption of the examination MacDonald was questioned as to the purpose in checking the contracts and the objection, if any, to selling all the cement a purchaser would take provided he would take it away and not leave it as a commitment in the hands of the manufacturer. He testified as follows:

"Q. Mr. MacDonald, we have just heard a statement from Counsel for the Commission. I would like to ask you now whether in reporting contracts to The Cement Institute, and receiving reports of duplications, what was your understanding, did it ever have anything to do with the prices? A. If I get the tenor of your question, the price was not in the influencing factor in our determination whether or not to cancel the unfinished balance of the contract, if that is what you mean.

Q. Well, in reporting, was it your purpose in reporting contracts—was it your purpose to protect yourself as to the quantity or commitment that you would be obligated for, or was it a matter of pri e? A. Our purpose in reporting the contract to the Institute was twofold, to first check our commitments to know what we had in actual sales commitments, and to prevent the diversion of low-price cement to current market business.

Q. Well, when you received word that a contract which you had been following was closed by another company, did your sales department continue to follow that contract? A. Only to the extent of confirming the report that it was actually closed.

[5] (R) Tr. 36498.

Q. Has the Northwestern States Portland Cement Company ever reported contracts to any agency or bureau other than the Cement Institute? A. No, sir.

Q. Did you ever learn of any instance where The Cement Institute took any position in the matter of the cancellation of contracts? A. No, sir.

Q. Finally, did your company ever instruct any of your salesmen that the Institute had anything to do with canceled or duplicated or padded contracts? A. No, sir.

Q. Now, ordinarily, Mr. MacDonald, does your company attempt to limit the amount of cement that you will sell to any customer? A. You mean in quantity?

Q. Yes. A. We will sell them all they can pay for and take.

Q. Do I understand you have no objection to selling a customer any quantity he wants within your capacity to ship? A. If he will take it and pay for it, that is all."[6]

Following the theory of Commission's counsel that contract reporting service was a scheme for the purpose of preventing stocks of low priced cement from being accumulated in the hands of dealers, Bates, Sales Manager of Federal, was questioned as to the relation between price and contract reporting. He testified:

"Q. You are not interested in getting business on a price basis? A. We are at our price of cement.

Q. But you do not go out and cut prices? A. Certainly not. If I go out to make a price I am going to make that to everybody. There is not going to be any one particular person who would get that price. I am going to give it to every one of our customers.

Q. But, couldn't you get business if you wanted to by reducing prices in this manner; namely, by telling a dealer that you will back him up if he will bid a little low, give him a secret price, you can get business. A. Are you telling me how to do it?

[6] (R) Tr. 36499-501.

Trial Examiner Norwood: I think he has already told us he could do that.

By Mr. Paulson:

Q. You can get business that way? A. Oh, yes, you probably could if you so desired, if that was the way in which you wanted to market your particular product, yes, but I had never——

Q. But you can get business away from your competitors simply by delivering more cement on a specific job contract than the job contract calls for, can't you? A. Well, yes, you could, I imagine.

Q. And isn't it because of that fact that you are interested in contract checking? A. No, I do not—my interest in that contract checking, and that contract information—I presume that you are talking now about my testimony in The Cement Institute services. My interest in that was to find out where a small company, with a small sales organization stood on a job and to find out quickly just what the position or the condition of a certain order is, or was. In other words, here is the way in which that operates: Our salesmen might be calling on a contractor for two or three weeks before the contractor will break down and say, 'Well, I have already placed that business.' It costs us a lot of money to follow that particular contract. Now, when we got the reports there as to who secured the business, we immediately close our file on that particular job.

Q. Well, it enables you to check on your own contracts, and it also enables you to protect yourselves against the sort of thing that I described; namely, that against the competitor of yours who delivered cement on a specific job contract over and above the amount that was called for? A. Well, our contracts, Mr. Paulson, are pretty carefully checked. We have our salesmen go out and ascertain the amount of cement in a job, and when we make a contract we do not try to make any fictitious contract. That is why we hire men who are trained in being able to check jobs.

Q. Has it been your experience any of your competitors made a practice of delivering more cement

on a contract than the contract called for, particularly after a rise in prices? A. No, I never experienced that. I know that we would not ship more cement. When the job is completed, we are through.

Q. But have you ever experienced a competitor doing that? A. No, I have never run into that."[7]

Alexander, President of Missouri, was questioned along the same lines:

"Q. Well, as to those instructions, are you interested in this information at times of price changes or at other times? A. We are interested in the information at all times.

Q. Why, Mr. Alexander? A. We are very anxious that our specific job contracts be accurate in estimates of the quantities required in order to avoid putting on our books an amount of cement which we will not ultimately ship, because it influences our operating plans and therefore throws them out of keeping with our shipments.

Q. Now, in the cases where your company has announced an advance in its prices, how much cement has your company permitted its customers to purchase,—has it made any limitations? A. No limitation on the cement that they are willing to ship within 15 days of the date of the advance.

Q. You are willing to sell them all the cement that they wanted? A. Any amount.

Q. At the lower price? A. Yes.

Q. Was there any reporting during that period by your company of any potential or anticipated contracts? A. We never reported a contract until it was actually signed up."[8]

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[7] (R) Tr. 30848-50.

[8] (R) Tr. 37241-42.

C. Institute and Other Statistics.

1. Statistics of Early Trade Associations

[Since 1903 at least the manufacturers of cement have concerned themselves to ascertain the condition of markets in which they competed for the sale of cement and to that end have sought information as to the amount of cement manufactured and shipped into various markets. Excerpts from the minutes of the Association of American Portland Cement Manufacturers at its meeting on September 8, 1903, disclose the following discussion of a proposal for the collection of statistics:

[Italicised part quoted in Fdgs. Par. Fifteen (b)]

"Chairman: We would be glad to hear from the members in reference to another matter which seems to be an interesting one, as to whether it would be considered advisable and feasible to have some figures, as the Pig Iron Association and other large industries have, as to the actual production and stocks on hand. When you read the newspapers you will read that there is almost twice the amount of cement manufactured as is actually made. We should have figures, *actual figures of the various mills* which could be furnished to any of the members of the Society, *showing from month to month, stocks on hand and the cement production and the capacity of the various mills,* and if we had some such thing it seems to me we would be better able to grapple with the various questions which arise.

Mr. Warren (Virginia): I move that the Committee on Warehousing and Selling Company, be requested so far as possible to obtain figures of the actual output and stock on hand of the various mills.

Mr. Hager (Illinois Steel): I move that the officers of the Association be requested to send to the various members of the Association requests as to their actual output from month to month, together with their stocks on hand, as near as may be estimated."][1]

[1] Com. Ex. 3235 Q.

[The action taken upon the Chairman's suggestion, if any, does not appear. However, at the meeting of March 8-9, 1904, at Philadelphia, one of the members present referred to figures received, collated, and sent to members of the Association by Mr. Goodell, and he observed that these figures were not sent to the Engineering Record and trade magazines, whereupon Mr. Gerstell, a representative of Alpha, stated:

> "Mr. Gerstell: Our Company also thought it would be very dangerous if this information were to get out to the trade, to dealers, contractors, etc., who would be informed as to the stock of cement we had on hand. They felt that if it could be safeguarded in such a way that there would be no possible chance of it being made public property, that it would then be all right."][2]

[At the meeting of the A.A.P.C.M. at Chicago on June 13-15, 1910, Mr. Craney of Union Sand, discussing the statistical report available to the members, said:

> "I believe we could act a great deal more intelligently in disposing of cement if the scope of that monthly report of the statistician was enlarged upon; in addition to reporting the number of kilns in operation and the stock on hand, if he also received a report as to the number of barrels shipped and the number of barrels sold, it would add very materially to the disposing of the product in an intelligent way.
>
> One thing that has given us faith in the market out west is that we have had some knowledge along that line. We have gathered statistics ourselves out there, and we saw that the product was moving, and moving more rapidly than it moved last year and at much higher prices. I believe if we would all report to the statistician on much broader lines that we would immediately reap the benefit of it. As to the

[2] Com. Ex. 3235 Q.

present prices out there, the lowest mill price is $1.10.'']³

[At another meeting in November 1910, Hagar of Universal, Chairman of the Committee on Statistics, made a report stating in part:

> "The Committee on Statistics has two branches of its work; one is the collection and dissemination of a monthly card of stock on hand, production and shipment; and since the June meeting we have added a comparison with the previous year in percentage of production and shipment. That information is being sent in by all but one member, and I am quite sure that his objections are caused by misunderstanding, and that we will be unanimous in sending in these figures.
>
> The other work that the Statistical Committee has been doing lately was the compilation of a statement from eighty-five cities of the country of the building permits for the last two months. The building permits have been furnished to the members from eighty-five cities throughout the United States.
>
> Now, the recommendation of the Committee on Statistics is that we anticipate the Government report for 1910 and get the information as to the productions and shipment and stock on hand in the United States early in January * * *."]⁴

[Following this report the minutes record:

> "Mr. Dickinson (Marquette): I would like to ask if the statistics we have on this card this morning include all the companies, or whether the Lehigh and Alpha Companies are left out; whether the stocks shown on the card are supposed to include all the members all over the country.
>
> The President: It includes only members of the Association.

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³ Com. Ex. 3235 Z-54.

⁴ Com. Ex. 3235 Z-72.

Any other comments, gentlemen? The chair will entertain a motion that all the companies send in a report after the first day of January, and that the statistician be instructed to make such a report and send it just as early after the first of the year as possible."][5]

[A motion to that effect was thereupon made and, after a brief discussion, it was carried.]

[In 1914, W. S. Mallory, then an officer of Edison, and beginning in 1933 statistician of the Institute, appeared as Chairman of the Committee on Statistics of the A.A.P.C.M. In the minutes of their meeting of September 16-17, 1914, there is a letter from Mallory to Lober, President of the Association of American Portland Cement Manufacturers, which reads as follows:

"Since the last meeting your Committee have issued the figures covering the total shipments of all the cement companies into the various States, and we hope they have proved of interest and value to our members. A study of the figures shows the sections of the country which need more publicity work, both by our members in those sections as well as by the Association.

Your Committee recommends that we be instructed to obtain and publish the figures covering shipments into the States for 1914 as early in 1915 as possible.

Your Committee have also arranged to act on the suggestion of your statistician and issue the monthly statistics of each district separately as soon as they are received, and we ask the co-operation of each member to help us get the complete figures out each month at the earliest possible date.

Your Committee urge that each member study every month the statistics of its home district and the surrounding districts with more interest than has been done before, and then make intelligent use of the facts obtained from such study. Very few industries have as complete statistics as we do, and

[5] Com. Ex. 3235 Z-73.

we ought to reap the full benefit of them during the winter period, when our product is not in as great demand."][6]

[The minutes of the meeting of the A.A.P.C.M. at Atlantic City on September 15-16, 1915 set forth a report by the Committee on Statistics signed by Blaine S. Smith, then of Penn-Dixie. The report suggested that statistics indicate the production of clinker rather than cement as a more accurate indication of the supplies on hand. The report stated:

> "The Committee also recommends that, in addition to the regularly monthly summary of statistics sheet, there be compiled and distributed each month other sheets, in form similar to attached, showing comparisons by districts of stocks of cement and clinker combined, production of clinker, and shipments of cement for current month and year to date—these comparisons to cover the period from January 1, 1911. Most of these figures are in the possession of the statistician. Figures showing stocks of clinker, production of clinker, and clinker-producing capacity to be obtained from members for the periods back to January 1, 1911."][7]

[In the course of the discussion following the report, it is recorded:

> "Mr. Brown (Alpha): I would like to say that we are heartily in favor of this information being given and will give it cheerfully, and I wish to tax the patience of the Association for just one minute further. It will be a great pleasure to me when the sentiment of the Association is crystallized to such a point as to throw open our individual books giving cement stock, shipments, and production to any manufacturer, which will enable us all to know just where our business is going and how it is being done. (Applause.)

[6] Com. Ex. 3236 Z-51.

[7] Com. Ex. 3236 Z-82.

The President: Did you forget the selling price in that proposition?

Mr. Brown (Alpha): Selling price too, Mr. President."][8]

[In December of the same year there was a further discussion of statistics and their collection at an Association meeting.][9]

The Cement Manufacturers Protective Association had for one of its declared purposes the collection and dissemination of information relating to production, stocks, and shipments of cement. The legality of the statistical work of this Association under the Sherman Act was examined in the case of the United States against the Association and sustained by the Supreme Court in the appeal in that case.[10]

2. Nature of Statistics Compiled and Their Distribution

a. Institute Statistics: 1929-1931

The purposes of the Institute, as stated in the Articles at all times, provided for the collection and dissemination of statistical information concerning past transactions.[1] The original Articles in Article XIV, Section 3, provided:

> *"Information as to Production, Stocks and Shipments*
>
> Each member shall forward to the Institute not later than the tenth of each calendar month (or on such other dates as may be fixed by the Board of Trustees) a statistical statement covering the pre-

[8] Com. Ex. 3236-Z-85.

[9] Com. Ex. 3236-Z-92-97.

[10] *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, 600.

[1] Com. Ex. 138; Resp. Ex. 2170; Com. Ex. 561.

ceding calendar month showing, in barrels, production of clinker and Portland Cement; stocks of clinker and of Portland Cement on hand at the end of the month; and total shipments; total bags returned by customers, and total bags rejected."[2]

The trustees, at their meeting on October 29, 1929, by unanimous resolution instructed the manager "to assign code numbers to all members to be used in sending out information from the Institute—all members to receive a copy of the identifying code numbers."[3] Membership lists were sent out from time to time[4] with code numbers and those numbers were used in the statistical data and the contract checking reports. The use of numbers instead of names was solely for brevity and convenience.[5] At the same meeting forms were submitted and approved by the Trustees for the statistical service. These forms were:

1. *Form #9* issued in duplicate every month and used by each member to report its monthly production of clinker and cement, cement shipments and stocks of clinker and cement on hand, stocks for the corresponding month in the previous year, the previous month's stocks on hand, shipments by the other mills for the member's account, and shipments by the member for the account of other mills. One copy of this report was returned to the Institute and the member retained the duplicate.[6]
2. *Form #11* used by the Institute office to tabulate by Bureau of Mines districts the information received from members on Form #9 and to show also the percentage of change over the previous month. This was distributed monthly to members.[7]

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[2] Com. Ex. 138 K.

[3] Com. Ex. 136 Q.

[4] Com. Ex. 153 A; 139 S; 1033 A-B; Resp. Ex. 129; 143 D.

[5] Reiter, General Manager, Institute (C) Tr. 4517-18.

[6] Resp. Ex. 144.

[7] Resp. Ex. 146.

3. *Form #10* used by members to report cloth sacks returned by customers and cloth sacks credited to customers for the month and for the corresponding month of the preceding year.[8]

4. *Form #12* used by the Institute to tabulate by Bureau of Mines districts the information received as to sacks. This was distributed monthly to members.[9]

The compilation and distribution of the statistical data on these forms was conducted separately for each division on a purely mechanical basis. The tabulation was made by clerks. The Institute did not interpret or draw or point any conclusions from the data.[10]

The statistical service, during the first two years of the Institute, followed the pattern described in the contract checking service.[11] That is, the service began on November 1, 1929 for the eastern division covering the Atlantic Seaboard to the Potomac River, eastern Pennslyvania and West Virginia. It was extended on January 1 to include the southeastern division, including the Atlantic Seaboard south of the Potomac, Virginia, Kentucky and Tennessee. It began on February 1, 1930 in the Chicago division, covering western Pennsylvania and the states north of the Ohio River, Kentucky, Wisconsin, Iowa, Minnesota and the Dakotas, and then at Kansas City under the officers of that division for Kansas, Nebraska, Arkansas, Oklahoma, Texas, western Missouri and part of Louisiana lying west of the Mississippi. Each division handled the statistics for its own area except when the New York office functioned for several months on behalf of the southeastern division. The services continued officially until May 12, 1931 when, because of

[8] Resp. Ex. 145.

[9] Resp. Ex. 147.

[10] Com. Ex. 137 R-V; Reiter report to Advisory Committee Meeting July 22, 1930; Reiter (C) Tr. 16808-09.

[11] *Supra*, pp. 1901-02.

numerous resignations, the data collected became too incomplete to be representative of conditions in the industry and the services were ordered discontinued.[12] The service was not resumed again until the fall of 1933.

b. Institute Statistics: 1933-1937

Upon the revival of the activities of the Institute following upon the passage of the NIRA, the Trustees appointed W. S. Mallory statistician of the Institute.[1]

Mallory had been president of the Edison Cement Company[2] and at one time president of the A.A.P.C.M.[3] and between 1926 and 1933 he rendered a statistical service of his own on cement which he sold to between 20 and 40 cement companies.[4] During that period his information had come from the Bureau of Mines which in turn had received it from the companies.[5]

Mallory was entirely independent in his operation of the Institute statistical service. He testified:

> "Q. Did you have anyone in the Institute with whom you ordinarily consulted about matters that you were in doubt about? A. No, as far as the statistic department was concerned, I was in charge of that and used my own judgment in whatever was done."[6]

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[12] Com. Ex. 136-3 K-3 L: Trustees' Meeting 5/12/31; Reiter (C) Tr. 16815.

[1] Com. Ex. 606 I: Trustees Minutes June 27, 1933.

[2] Scott, President, Keystone (R) Tr. 27381.

[3] Com. Ex. 3235 Z65: Minutes of Annual Meeting A.A.P.C.M. 12/13-14/10.

[4] Mallory (C) Tr. 17197-99. See *infra*, p. 1985 *et seq.*

[5] Id., Tr. 17208-09.

[6] (C) Tr. 17348.

The Institute statistical service as conducted by Mallory began about September 1, 1933[7] and continued without change in manner or method of operation at least until March 7, 1939 when Mallory gave his testimony.[8] This service included no statistics on cloth sack returns, but otherwise it was "quite similar" to the service rendered in the 1929-1931 period, except that it was all centralized in Mallory's office.[9]

The revived statistical service provided for the following reports on the basis of information supplied by members:

1. A report form, unnumbered, on which members reported monthly to the Statistical Bureau clinker on hand at the end of the previous month, clinker production for the current month, clinker ground during the current month, remaining clinker stock at the end of the current month, cement on hand at the end of the previous month, cement production for the current month, shipments for the current month, and cement stock on hand at the end of the current month. The form requests that the information called for be forwarded by the 5th of the succeeding month and no later.[10] The information on this form is the only information supplied by members to the Statistical Bureau.[11]

2. *10th of the Month Report* issued by the Statistical Bureau to members reporting on the basis of the figures on clinker and cement production and stocks and cement shipments supplied by members on the above form. The report gives, by Bureau of Mines

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[7] Mallory, (C) Tr. 17197.

[8] Id., Tr. 17228.

[9] Reiter testified that the Kansas City division resumed the collection and publication of statistics on production shipments and stocks and continued until some time in 1936 (C) Tr. 16816.

[10] Resp. Ex, 148.

[11] Bowen, Vice President, Lehigh (R) Tr. 26984-85.

districts, clinker and cement production for the last month covered by the report and for the year ended that month, cement shipments for the same, and clinker and cement stocks on hand at the end of the month. The figures are broken down by mills of companies located within the district, each mill being designated by a code number.[12] The "tenth of the month" report is the only one of the Statistical Bureau reports based on figures supplied directly by members of the industry.[13]

In addition to the tenth of the month report based on data submitted by the members, Mallory distributed four other reports, giving data by Bureau of Mines districts, namely:

1. *Percentage of Capacity Utilized*: A monthly report showing the clinker capacity of each of the 12 Bureau of Mines districts; the clinker production and cement shipments for the 12 months' period ending with the current month, the percent of clinker produced and cement shipped during such period based on the clinker capacity, and the stock of clinker and cement on hand as of the end of the current month.[14]

2. *Days' Supply of Finished Cement in Stock*: A monthly report based on the daily average (365 days) of the 12 months ending on the last day of the current month giving average daily supply on hand by districts as of the last day of the current month,

[12] Resp. Ex. 149 A-G; Com. Ex. 2918: The code numbers used by Mallory differ from those used by the Institute in the contract balance reporting and checking service and in the statistical service conducted by the Institute in 1930. Paulson (C) testified that Mallory told him that he had a key number for each plant in the industry and that the Institute gathered and disseminated statistics by number rather than by full name of plant. Tr. 7581.

[13] Reiter, General Manager, Institute (C) Tr. 16817, 16820-21; Com. Ex. 2918.

[14] Resp. Ex. 150; Reiter (C) Tr. 16819.

the last day of each of the eleven preceding months, and the last day of each of the corresponding months in the preceding year.[15]

3. *Average Factory Value*: Issued quarterly showing by Bureau of Mines districts the average factory value of cement produced and shipped in the United States for the years 1920 to date of the report. This report states that it is compiled from statistics furnished by the United States Bureau of Mines.[16]

4. *Dollar value of Contracts Awarded*: A report showing for each state in each Bureau of Mines district (except Districts 10, 11 and 12) the dollar value of construction contracts awarded (which includes all building materials and construction costs) during the year through the current month and during the three preceding years through the corresponding months as compiled by the F. W. Dodge Corporation. It contains an estimate by the statistician based on these contract awards of probable percentage increase or decrease of cement consumption for approximately the next six months during the current year over a like period in the prior year.[17]

This report on Dollar Value of Contracts Awarded is the only report which contains any estimate of future probabilities and is based entirely on data arising outside the cement industry.

In response to a request from Reiter, General Manager of the Institute, Mallory wrote to him on July 26, 1935 enclosing a "brief resume covering the data issued by the Statistical Department" as follows:

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[15] Resp. Ex. 151; Reiter, General Manager, Institute (C) Tr. 16819-20.

[16] Resp. Ex. 152; Reiter, *supra* (C) Tr. 16820.

[17] Resp. Ex. 153 A-C; Reiter, *supra* (C) Tr. 16820.

[Italicized part quoted in Fdgs. Par. Fifteen (i)]

A) Gives the percent of clinker production and cement shipments on the basis of clinker capacity for each district for the preceding twelve months; also the amount of clinker and cement produced, and the shipments, for the current year. The purpose of this report is to enable each company to estimate the production and shipments of its plant or plants and to know every month whether it is producing and shipping more or less than the average of all the plants of the district in which the plant is located. Issued monthly.

B) The purpose of the report marked 'B' is to show all stocks on the same basis by using days' supply instead of barrels in order to bring out clearly when the stock of any one district is becoming too large; to illustrate, on June 30th Michigan had enough cement on hand to supply the 1935 rate of demand until about January 15th, 1936, without producing any in the meantime. Issued monthly.

C) Gives the average factory value per barrel of portland cement from 1920 to March 31st, 1935. This report is issued quarterly.

D) This series of reports gives for each company the amount of clinker and cement produced, the amount of cement shipped, and the clinker and cement stock of the previous month, together with the total production and shipment figures of the previous twelve months. A key sheet for Districts 1 and 2 is attached, as well as the forms used to obtain the information. (Reports for the Rocky Mountain and Pacific Coast districts are not issued.) The purpose of this tabulation is to enable each company to know not only what it is producing and shipping, but also what each of its competitors is doing.

E) Gives for each state in Districts 1-9 inclusive the dollar amount of building contracts awarded during 1935 up to the current month, together with

the amount awarded during the same period for each of the past three years. The purpose of these figures is to indicate in which state or states there is the probability of a change in demand. An estimate of the probable consumption (shipments into states) in each district over a period about six months hence also accompanies these figures in order to give the companies some idea of what the future consumption may be."[18]

And again on April 2, 1936 Mallory wrote to Reiter:

"I am enclosing herewith a set of the reports issued by the Statistical Department, together with a memorandum giving a brief description of each report, and also the blank forms on which the companies send the information to us. (Key sheets are also attached.)

[Italicized part quoted in Fdgs. Par. Fifteen (i)]

I have no knowledge as to the actual value the reports have to the companies. However, they are issued in the belief that they help the companies by eliminating their suspicions in connection with what their competitors are producing and shipping since they get the facts, and the reports also bring them information about current conditions in the construction industry."[19]

On the witness stand Mallory was asked as to the effect of suspicions entertained by manufacturers as to shipments by their competitors. He replied that information derived from salesmen could not be regarded as accurate.[20]

"A. I don't know that it had any effect on anybody except myself.

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[18] Com. Ex. 1025 A-B.

[19] Com. Ex. 2879.

[20] (C) Tr. 17235.

By Mr. Wooden:

Q. You never heard that discussed in any gatherings of cement men? A. Never."[21]

i. Mallory's Method of Rating Plant Capacity

In connection with the issuance of the report marked "A" above (p. 1938), Mallory used his own formula for estimating plant capacity. He explained it as:

> "The historical record of their clinker production, taking the three highest consecutive months' clinker production; dividing that total of the three months by the number of days in the three months, giving the daily average. Multiplying that by 365 days gave an estimated annual capacity."[22]

These are estimates of clinker capacity and he made them himself from the monthly reports of clinker production made by the members.[23] These estimates, as distributed by Mallory, were estimates of total clinker capacity of the plants—grouped together and without showing individual company figures—in each of the Bureau of Mines districts.[24]

The Bureau of Mines also published similar figures for the productive capacity of the plants in each of the districts but these figures were a total of the estimates of cement capacity (as distinguished from Mallory's clinker figures) made and furnished by each company.[25]

Mallory criticized the Bureau of Mines method and on this testified:

> "A. I found in figuring the total clinker capacity based on the actual historical production in some districts was a good deal smaller than the published

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[21] (C) Tr. 17237.

[22] (C) Tr. 17216.

[23] (C) Tr. 17227-28.

[24] Resp. Ex. 150; Com. Ex. 2917 P.

[25] (C) Tr. 17227-30.

figures of cement published by the Bureau of Mines and I talked it over with Mr. Klotz[26] at that time and showed him at that time how I was figuring the estimated clinker production and for several years after that he and I checked the estimates made by the companies as against this formula.

Q. Did the estimates made by the companies, individually, and submitted to the Bureau of Mines, did they show a larger capacity, total capacity, for the industry than was shown by the three months' highest production basis? A. Some of them, materially larger. Some of the company reports.

Q. My question was particularly as to the net result upon the showing of the industry, on that basis. A. In some districts, materially higher.

Q. Were there any districts where it showed lower than the other basis? A. I don't recall.

Trial Examiner Norwood: Well, would the general results for the entire industry tend to be higher?

The Witness: I would think yes.'"[27]

Reiter, when questioned as to Mallory's criticism of the Bureau of Mines' figures and production capacity, testified:

"I do know that the U. S. Bureau of Mines does figure capacities of plants in the cement industry in that manner. That seems to be as fair a manner of computation as can be consistently made throughout the country.

Q. Are not the three highest consecutive months' production on their face higher than an average showing; in other words, isn't it something that has been attained only quite rarely in three months? A. I believe that the complete figures would show that some mills at least have attained an annual output equal to the capacity figured in that manner.

There are retarding effects in the plant itself on the thing you have in mind. They take the three

[26] A statistician in the Bureau of Mines.

[27] (C) Tr. 17229-30.

highest consecutive months. And over a three months period that would indicate at least the maximum capacity of that plant. Then there is no reason, if demand was sufficient, why they couldn't continue through the other twelve months, although I will admit that it is rarely done."[28]

Coogan testified that Alpha submitted data as to its capacity to the Bureau of Mines and when he was asked whether the company attempted to keep this a secret in any way, he answered:

"A. No. The matter of the capacity of our plants or of any other cement plant or plants is not a secret in any sense of the word, and can easily be ascertained or obtained by anybody with ordinary average intelligence. In fact, it is well known to the workmen around the mill, and to the people who live in the neighborhood. So, there is no secret of capacity. And, our own company has never made any attempt to make a secret of it."[29]

Distribution of Statistics by the Institute

Member companies in Bureau of Mines Districts 10, 11 and 12 (the Pacific Coast and Rocky Mountain states), although contributing statistics to the Bureau of Mines, never contributed statistics to the Institute and substantially no statistical service was rendered to members of those Districts or to members of District 4 and only a limited service was provided in District 9 by the Institute.[30] Mallory testified that statistics had been sent to Pacific Coast companies only for a year or two probably beginning at the time after Reiter made a trip to the Pacific Coast.[31]

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[28] (C) Tr. 4425-26.

[29] (R) Tr. 23920-21.

[30] Com. Ex. 595 C: Reiter to Conn, dated July 10, 1936, giving resume of statistical service.

[31] (C) Tr. 17288.

3. Availability of Institute Statistics to Non-Members and Public Officials

At their meeting on May 18, 1937 the Trustees passed a resolution that the "Tenth of the Month" Report showing production, shipments and stocks on hand be sent to all non-members of the Institute contributing data to the reports on payment of $25 a year, and that all other reports of the Statistical Bureau be furnished upon request to federal and state officials without charge and to non-members upon payment of $25 a year.[1]

4. Objections to Identification of Company Statistics

At their meeting on May 26, 1930 the attention of the Trustees was drawn to the objection on the part of members of the Kansas City Division to the identification of statistical data by companies and "the Secretary was instructed to confine for the present the distribution to members of this statistical data regarding shipments, production and stocks in the Kansas City district to the total figures, not giving the details by individual companies."[1]

Upon having his attention called to written objections made by the presidents of Marquette and Ash Grove, Reiter testified:

> "Q. Well, were these objections, such as referred to in the exhibits—were these objections to the 10th-of-the-month reports numerous, Mr. Reiter? A. Far from it.
>
> Q. Were members ever required to supply these figures? A. No, it was entirely a voluntary matter.
>
> Q. Now, take the NRA Code or the Code Authority, did it ever require members of the industry to supply such statistics? A. No, it did not."[2]

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[1] Com. Ex. 628 B: Trustees' Minutes.

[1] Com. Ex. 136 WW: Trustees' Minutes.

[2] (C) Tr. 16824.

In a letter to The Cement Institute, dated July 3, 1936, Wecker, President of Marquette, said:

> "We cannot see that the dissemination of this detailed information serves any useful or proper purpose. The intimate details of our business are of no concern to our competitors and we fear that the only result of this policy of the Institute will be to indicate to the public a relationship in the industry which has no basis in fact."[3]

Immediately upon receipt of this letter, Reiter, General Manager, sent a memorandum to Mallory, stating:

> "Statistical reporting of all kinds to The Cement Institute is a voluntary matter and until it is possible for Mr. Wecker's suggestions to be properly acted upon please follow strictly his request that any figures on Marquette production, shipments, and stocks on hand, be held in confidence. If you cannot follow Mr. Wecker's suggestion that the figures he sends you be grouped with others without disclosing figures submitted by Marquette please omit Marquette's figures entirely until further notice."[4]

Wecker, again wrote the Institute on July 17, 1936 to the attention of Mallory. He said:

[Italicized part quoted in Fdgs. Par. Fifteen (i)]

> "In continuing this perusal, we now come to the matter of making monthly reports on production, shipments, and stocks, something we have done without questioning for quite some time. We are not entirely certain of the original underlying reasons for this procedure, but believe the original intention was to enable the several manufacturers to obtain monthly statements on the situation in the various districts with respect to production, shipments and stocks, much more quickly than obtainable from the Federal Bureau of Mines, which also collects and disseminates

[3] Com. Ex. 1025 D.

[4] Com. Ex. 1025 I.

similar data. There is, of course, a decided advantage in securing this information as speedily as possible and, unless the Bureau of Mines can be prevailed upon to speed up its reports, we are in favor of continuing the present procedure. *However, we do object to the manner in which reports are presently issued by the Institute. They show the situation with respect to production, shipments, and stocks of each individual plant in a given district, designating each plant by a key number. But, since the key is known to us, and we presume to all other manufacturers as well, the result is to make known to each member of the Industry the exact position of each of its competitors.*

As in the case of the reporting of contract information, covered by the attached copy of letter, we maintain that such a detailed dissemination of information serves no useful purpose whatsoever. We do not require that information concerning the business of our competitors and we see no reason why they are entitled to such information concerning our business.

All that is necessary or desired is a simple statement once each month exactly similar to the statement produced by the Bureau of Mines. This statement shows the production, shipments, and stocks by districts established by the Bureau many years ago. The district figures given cannot be broken down by anyone to show the individual figures of a particular manufacturer. Preferably an effort should be made by the Institute to cause the Bureau of Mines to speed up its monthly compilations and dissemination of these figures. If this were accomplished, there would be no need for duplicating the work through the Institute as is now done.

Because of the foregoing, we demand that an effort be made to speed up the issuance of reports by the Bureau of Mines so that reporting through the Institute may be dispensed with entirely and that meanwhile information filed with you by us covering our production, shipments, and stocks, be held in confidence by you with the distinct understanding that it is to be grouped with the figures from other

manufacturers only in such a manner as to prevent disclosure of our individual figures to any other manufacturer by either the process of deciphering a key or by the process of elimination.'"[5]

Some months later, Wecker wrote Storey, Vice President of the Institute declining an invitation to attend a meeting of the trustees presumably to discuss Wecker's objection to the method of handling statistics on the ground that no member not a trustee had a right "to advance whatever views we may hold in a meeting of that body." After reference to his company's attitude heretofore expressed, he concluded:

"May we suggest that the dissemination of information concerning the business done by each of its members is not a proper function of the Institute?"[6]

On August 22, 1936 Sunderland, President of Ash Grove, wrote to Conn, President of Giant and a member of the recently appointed Committee on Future Activities, as follows:

[Italicized part quoted in Fdgs. Par. Fifteen (i)]

"The known objections on the part of an uncertain number of the members of our industry to the form in which reports of production, stocks, and shipments have been distributed. Frankly, I question whether we could secure government approval of our present method and forms which reveal to competitors such intimate details of their business operations.

So far as I know it has always been the policy of the government in its compilation and distribution of industrial statistics to protect all contributors of such statistics from individual identification.

It is well known that such statistics have been misused, and besides, have been a source of constant irritation ever since they were instituted, which I

[5] Com. Ex. 1025 G-H.

[6] Com. Ex. 1025 L.

believe was under the NRA. Consideration of this matter is clearly contemplated by Section 2, Page 6 of the report, but I think the Trustees at the time of receiving the report should be informed of the objections which have been registered, both formally and informally, against the revelation of individual statistics.'[7]

Subsequently, Sunderland sent in the company's figures to the statistician subject to a condition and wired Mallory that

> "* * * ON ADVICE OF COUNSEL WE CANNOT CONTINUE FURNISHING YOUR OFFICE STATISTICAL DATA EXCEPT WITH PROVISO THAT SAME SHALL BE FOR YOUR PRIVATE CONFIDENTIAL INFORMATION TO BE USED ONLY IN TOTALS AND IN NO EVENT IN SUCH FORM AS TO REVEAL INDIVIDUAL COMPANY FIGURES AND YOUR ACCEPTANCE AND USE OF SAME WILL CONSTITUTE AN AGREEMENT ON YOUR PART ACCORDINGLY.* * *"[8]

Reiter immediately wired to Mallory as follows:

> "MISTER SUNDERLAND HAS SENT ME COPY HIS TODAYS WIRE TO YOU STOP AS IN PREVIOUS CASE PLEASE OBSERVE STRICTLY CONDITIONS UNDER WHICH THESE FIGURES ARE FURNISHED AS THESE ARE VOLUNTARY FILINGS AND CONDITIONS UNDER WHICH FILED MUST BE OBSERVED."[9]

Thereafter in accordance with their wishes Marquette's and Ash Grove's figures were not embodied in the reports and no statistical data was sent to them.[10]

At a meeting of the Trustees on September 10, 1936 the criticisms embodied in communications from Wecker and Sunderland evidently came to the attention of the Board. The minutes record:

> "There was presented for consideration by the Board a criticism of the present method of collecting

[7] Com. Ex. 870-6 H.

[8] Com. Ex. 1025 M.

[9] Com. Ex. 1025 N.

[10] Com. Ex. 1025 O-P.

and disseminating statistics on production, shipments and stocks on hand by the Statistical Bureau. After considerable discussion a motion was made by Mr. Alexander and seconded by Mr. Rader that the General Manager be instructed to consult Counsel concerning this matter and when opinion was received from Counsel to advise the members of the Board and all members of The Institute, including the member who raised the question. Motion was unanimously carried."[11]

At the following meeting of the Board on December 17, 1936 an opinion was stated on this subject by T. J. McFadden, Esq., of counsel. The minutes record:

"* * * Mr. McFadden stated that the only report in controversy seemed to be the one known to the Statistical Bureau as 'the tenth of the month report' wherein is reported by districts, production, shipments and stocks on hand identified to show members reporting. Counsel referred to the decision of the U. S. Supreme Court in the Cement case (*Cement Mfrs. Protective Ass'n* v. *U. S.* 1925 268 U. S. 588), wherein the court had approved the compilation and dissemination of identified statistics on the production of clinker and ground cement, shipments and stocks on hand. In that opinion the court had observed that 'Each member of the Association was thus given full information as to the available supply of cement *and by whom it was held.*' Accordingly, Mr. McFadden stated that Counsel was of the opinion that it was not illegal for The Institute to disseminate statistical information concerning production, shipments, and stocks on hand which had been compiled in such a manner as to indicate the figures for individual companies. Counsel stated that this opinion was limited to the manner in which the Statistical Bureau of The Institute collected, compiled, and distributed such statistics. Counsel stated that the statistical information as received from The Institute by the members was not objec-

[11] Com. Ex. 626 G: Trustees' Minutes.

tionable but that this opinion could not justify any improper use of such information after it had been received."[12]

Wecker, President of Marquette, was examined as to his protest above set forth on these statistics, and he testified:

"Q. What was there objectionable in that as you saw it? A. Well, we have always taken the—always been of the opinion that that was our own private information and that we didn't want it bandied about, or that we didn't want any other competitor to have it.

Q. Did you see any danger to your company in other competitors having it? A. No, I can't say that I saw any particular danger in it, Mr. Wooden.

Q. Not even potential danger? A. Well, I don't know.

By Trial Examiner Norwood:

Q. Trade disadvantage? A. Oh, I can't say as to that. We simply took the position that we didn't want our competitors to know what our shipments were.

Q. And was that based on any thought of disadvantage to your company? A. Nothing specific, no, sir."[13]

Wecker further testified that after refusing to send statistical data to the Institute, he stopped sending it to the Bureau of Mines lest if Marquette was the only company failing to supply the same information to both, the differences between their reports would reveal Marquette's statistics.[14]

Colburn, Vice President of Marquette, pressed as to the "strictly business reasons" for discontinuing the submission of statistics, testified:

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[12] Com. Ex. 627 C: Trustees' Minutes.

[13] (C) Tr. 14044-45.

[14] (C) Tr. 14063.

"A. Well, the thing came in, Mr. Wooden, through the Code* in the cement industry. We had no objection to giving our figures on shipments and production, if they were not reported back to our competitors, so that they would know what our production figures were or what our shipment figures were, so—if you will pardon me, I will try to finish my statement—we did not figure that that was any of their business. We figured that the less competitors knew about what we were doing, the better we would be off. So we just quit it.

Q. You had the advantage during that period of knowing what they were doing? A. We found that we could make no money trying to run our business like other companies ran theirs.

Q. You did not have to run it like theirs. A. I know, but it is likely to mislead you. I don't want it. We don't want any of their figures. We want to run our own company in our own way.

Q. You say there was no advantage to you in knowing what the shipments of your competitors were? A. None whatever, individually.

Q. What disadvantage was it to you in having your shipments known to your competitors? A. We just figured that they would start jumping at some conclusion, and, maybe, get as good as we were, and we didn't want that, either.

Q. What kind of conclusions? A. Lord knows what kind they might jump at. I don't know.

Q. Do you mean you think they might think you were doing too much business? A. I don't know what they might think.

Q. Did you have any experience, during the time you were reporting it, along those lines? A. No.

Q. Ever have any comment from any competitors about it? A. No.

Q. About the size of your shipments? A. No.

Q. Did you know before the Code, or at the time the Code was under discussion, that the Marquette

* The Cement Code made no provision for the collection and dissemination of statistics, except information desired by Governmental agencies. Com. Ex. 557.

Company was accused of having enlarged the volume of its business by price cutting? A. That might be true.

Q. Well, did you know that at the time? A. No, sir; at the time I didn't know it.

Q. When you spoke about conclusions that they might draw, did you not mean that they might draw the conclusion that because your shipments were disproportionately large, they would charge you with price cutting? A. No, I was not so much worried about that. It was a fact that they might go and make some prices to reduce that tonnage. I didn't care what they thought about it.

Q. That was, then, a business objection, as you saw it? A. Right.

Q. And the possibility of an increase in that tonnage might lead to price cutting on their part? A. It might not lead to price cutting. It might lead to a general price reduction. I don't know what it might lead to.

Q. What is your distinction between a 'general price reduction' and 'price cutting'? A. Well, I can only speak for our own company, Mr. Wooden. A general price reduction is an open quotation, and if you use the term 'price cutting' it is a special price.

Q. You mean a secret price? A. A secret price—a price between the buyer and seller only.'"[15]

Sunderland, similarly probed as to the basis of his objections as stated in his letter to Conn, set forth above,[16] and particularly as to the alleged misuse of statistics, testified:

"Q. Mr. Sunderland, directing your attention to the fourth paragraph of your letter, which is Exhibit 870-6H, you say 'It is well known that such statistics have been misused?' Will you specify wherein these statistics of the Cement Institute had been misused. A. Well, I was doubtless referring to

[15] (R) Tr. 39985-87.

[16] Com. Ex. 870-6 H. *Supra*, pp. 1947-48.

a certain practice which I have always objected to, the revelation to competitors of individual information furnished to the statistician as to stocks, production and shipment. And, as I stated in this letter, it always results in, and naturally results in constant irritations. If it showed we were doing more business than some jealous competitor, who is doing considerably less, he would feel, naturally, that either his sales department was derelict or for some unfair reason we were getting more business than we should.

On the other hand, the effect upon the fellow that is in that situation would be that he might gloat over it and make fun of his competitor who was not able to do that, and it was just—it would be just a sort of constant irritation. That has been my experience, and it is based on my knowledge of human nature. I cannot tell in any case where it specifically has been abused. That is what you asked me.

Q. And yet you say in your letter it is well known that it has been abused.

Now, you don't know it so well, or what? A. I think it is an abu. , and I undoubtedly had that in mind.

Q. Well, didn't you say it was well known that such statistics had been abused? A. Well, that is what the letter says.

Q. Yes. Or 'misused' I believe is the word. A. Yes.

* * * *

Q. I am just asking you to give some details to back up your statement in this letter that it was well known that such statistics have been misused. A. I can't give you any details.

Q. Were such statistics ever misused with reference to the Ash Grove Company? A. Well, I think they are misused when they are revealed to competitors.

Q. Do you mean that there is a potential misuse of them? Is that what you mean? A. No, I think it is a misuse of them when they are revealed to competitors.

[Italicised part quoted in Fdgs. Par. Fifteen (l)]

Q. I believe you said they were revealed under the system that was then being used? A. They were during part of the time.

Q. You said that the revelation of such matters to competitors tended to make a mill who was not increasing its business suspicious of the man who was increasing his business? A. I did.

Q. Is that right? A. And that has been my observation all my life. It is just a phase of human nature that shows itself under those conditions.

Mr. Leisure: I thought the word was 'jealous' and not 'suspicious', Mr. Wooden.

Mr. Wooden: Well, all right. The witness has adopted that.

The Witness: I said 'jealous' in my first answer.

Q. Did you also say that it tended to make other mills think that the mill that increased its business had done so by unfair methods? A. Tended in that direction; yes, sir.

Q. Did you mean to include in your term 'unfair methods' that of price cutting? A. Well, that would be one. It might be that method, and there might be some other way of endeavoring to increase business without adhering to fair competition or fair trade practices."[17]

And further:

[Italicised part quoted in Fdgs. Par. Fifteen (l)]

"Q. On what grounds did you discontinue furnishing them? A. Well, back of our declaration was the thought that I have expressed here, the reason that I have expressed here. And, I also expressed a reason that we believed it was illegal.

Q. Has there been any specific harm result to your company from it? A. Well, that is rather intangible and I couldn't give you any specific case.

Q. What is your belief in regard to it? A. Well,

[17] (C) Tr. 13662-66.

I believe that when we have been fortunate enough or enterprising enough to do a larger amount of business than some of our competitors, our jealous competitors, thought we ought to do, doubtless it would result in activities of theirs that were harmful to us.'[18]

5. Bureau of Mines Statistics

The Bureau of Mines has for a great many years collected and made public, monthly and annual statistical data on:

1. production, shipments and stocks of cement by States and by Bureau of Mines districts;
2. monthly estimates of cement produced, shipped and in stock at mills by districts;
3. monthly shipments from mills into States;
4. estimates of cement—manufacturing capacity by districts and monthly tables showing ratio of production to capacity; and
5. other statistical data.[1]

All of this data is based upon reports made by members of the industry.[2]

As to the difference between Institute and Bureau of Mines statistics Mallory, the Institute's Statistician in 1933 and later years, testified that the Bureau of Mines gives only totals for each district, while the Institute shows what proportion of estimated clinker capacity is produced or shipped.[3] Coogan, Vice President of Alpha, testified that Bureau of Mines figures show only totals of shipments,

[18] (C) Tr. 13669.

[1] Com. Ex. 3: Minerals Year Book 1937, Chapter on Cement.

[2] Bagley, Statistician, Bureau of Mines (C) Tr. 60-61.

[3] (C) Tr. 17284.

production and stocks on hand while Institute figures show the same figures for individual companies in the districts. He added that the Institute figures were "simply more information".[4] Brobston, President of Hercules, testified that in the Institute figures there might be one or two mills that were not included whereas the Bureau of Mines had figures for all.[5]

Reiter, former General Manager of the Institute testified that the reason the Institute undertook this service was that the Bureau of Mines took a long time to get its data distributed and the industry wanted the information more promptly.[6]

6. F. W. Dodge Corporation Statistics

As to the service rendered by the F. W. Dodge Corporation on building construction and contracts awarded and the practical value of it, Bowen, Vice President, Lehigh testified:

> "Q. Do you subscribe to that service? A. We do. The organization is a very large and very effective one. It collects information by means of a large field force which calls on engineers, architects, and public officials.
>
> This information is tabulated in individual construction reports which the Dodge Company sells to contractors, material men of all kinds; any one who is interested in the construction business.
>
> Q. What types of materials does it cover? A. It covers all sorts of material in every kind of construction work.
>
> In addition to the individual construction reports, the Dodge Company, which operates, as I recall it, in 37 States east of the Rocky Mountains, tabulates the statistical data from these construction reports and publishes various kinds of statistical

[4] (R) Tr. 23902-03.

[5] (C) Tr. 10579-80.

[6] (C) Tr. 16808.

analyses which, as to the past, gives data on the amount of construction, divided, public and private, and into the various groups of construction, and, in addition, from time to time, attempts to project those figures in the form of estimates as to what the future volume of construction is likely to be."[1]

7. Bureau of Labor: Wholesale Price Statistics

The Bureau of Labor Statistics publishes a statement of wholesale prices, including prices of cement. In a letter to Reiter, dated October 9, 1935, Mallory criticized the Bureau's cement prices as non-representative and too high.[1]

Asked to explain wherein the Bureau of Labor Statistics figures were not fair to the industry, Reiter testified:

> "A. (After examining document) The Wholesale Price Division of the Bureau of Labor Statistics of the U. S. Department of Labor had for many years collected from six companies, I believe, information on changes in their so-called base prices at such mills. They were unfair in that they didn't properly average the conditions over the United States for which they attempted to report, and also because the figures used were not in fact prices.
>
> Q. You mean because the base prices at the mills were not prices, and that has been your position hitherto, I believe? A. Yes, sir."[2]

Asked if changes had been made by the Bureau of Labor following the correspondence between Mallory and the witness on the subject, Reiter said:

> "• • • they now have out a tentative report which indicates a change in their method of reporting, which is being considered by their advisory committee.

[1] (R) Tr. 26989-90.

[1] Com. Ex. 204 N.

[2] (C) Tr. 4423-24.

Q. Still under consideration and no action yet? A. No, it has not been adopted.

* * * * *

Q. My question was whether that was to cover average prices as distinguished from these mill base prices that had been used. A. To answer your question as briefly as possible, their new plan takes the actual destination price at some 16 widely scattered cities in the United States, and subtracts from it constant factors, such as the cost of package and cash discount, and compares the remainder weighted by the amount of shipments in that area to previous years.

Q. It is the delivered price in that area then subject to the deductions that you have named? A. That is right."[3]

8. Committee on Reconciliation of Statistics

The members of the Institute made statistical reports to the Bureau of Mines, to the Institute, and to the Portland Cement Association. The report was made to the last solely for the purpose of determining the dues owed to that Association. The form of reports to these three organizations varied.

At a meeting of Districts No. 1 and No. 2 on November 7, 1935, Robeson, Vice President of Nazareth, moved that a committee of two be appointed to develop a formula to insure a uniform basis for reporting. The motion was unanimously carried and Scott, President of Keystone, and Porter, President of North American, were appointed to the committee.[1]

Porter, a member of the Committee, testifying as to the occasion for the Committee, said:

> "A. One of the reasons—one of the important reasons was that there were three bodies to whom we and other manufacturers were reporting production

[3] (C) Tr. 4427-28.

[1] Resp. Ex. 1370 A-C: District Minutes 11/7/35.

and shipments, stock statistics; namely, the Bureau of Mines, the Portland Cement Association, and The Cement Institute. Each of those bodies required a separate reporting form and required the data set up in a different way, and it meant considerable amount of what I considered to be unnecessary work on the part of our accounting departments.

The other reason was that dues in both the Portland Cement Association and in The Cement Institute were based on shipments, and I had the suspicion—I think others did also—that all companies were not reporting on the same basis. In other words, there were a number—there is not just one kind of Portland cement; there is a number of different kinds of cement, some of them Portland, some of them not Portland, and I felt that if we were reporting mortar cement, for example, and some other company was not reporting that, that we were being gyped on our dues, so I was anxious to straighten that out."[2]

Scott, the other member of the Committee, was interrogated as to what the Committee deemed necessary to reconcile. He testified:

"Q. What need did you find for any reconciliation,—what needed to be reconciled? A. Well, I think the name of the committee was rather elaborate and it prompts your question, of course. The only thing that I remember on that committee, that we were trying to do, was to cut down the numerous reports that we were having to prepare monthly and send out, and to see if one general report or one general form could not accommodate all of the information that we were then sending out on ten or a half a dozen reports. That is my recollection,—reconcile one form with the other. I would say that is about what was meant.

• • •

Q. Well, didn't you find that there was some difference in the reports by a particular member to

[2] (R) Tr. 33790-91.

those various bodies? A. We did not get into that part. I mean, this little committee was not interested even if there were any differences, we were not interested in that at all."[3]

There was a reference by Porter to attendance by Mallory at one of the meetings of the Committee.[4] Mallory could not recall this but he did recall the Committee and its purpose. From him, also, the Commission's Counsel endeavored to secure information as to what the Committee had to reconcile. Mallory testified:

"A. I remember very definitely having a conversation with Mr. Porter in his office on that subject. I still do not remember sitting in with the committee. If he says I did, I probably did.

Q. What was the condition that this committee on reconciliation of cement statistics was working on? A. As I recall, the principal difference was the distribution of the shipments in the several items such as cement that was used for masonry, cement that was used on the plants, cement that might be lost in transportation and exports, as I recall them it was all lumped together.

• • •

Q. Wherein does the breaking down of the totals of the certain classes of business constitute a reconciliation? What was it to be reconciled, is what I am getting at. A. I don't understand just why the word 'reconciliation' should have been used.

Q. That was the title of the committee, wasn't it? A. So the letter states.

Q. And you can't explain what was to be reconciled? A. No. Other than the shipments; the distribution of the shipments."[5]

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[3] (R) Tr. 27654-55.

[4] Com. Ex. 230 N: Letter, Porter to Coffin, President, The Institute, dated December 3, 1935.

[5] (C) Tr. 17455-56.

Reiter, examined as to the functions of this Committee, testified:

> "Now, the report forms on which these three reports were made were widely different and this committee proposed to suggest a single form which might be run through the typewriter once and copies sent to these three persons and save work and possibly errors in the offices of the Cement companies.
>
> Q. In all three cases—the Bureau of Mines, the Institute and the Portland Cement Association—I understand the shipments by States were reported. Is that right? A. Yes, sir.
>
> Q. Were those figures on shipments by States the figures that needed to be reconciled? A. I do not understand what you mean by your question.
>
> Q. Well, this is a committee on reconciliation of statistics and I am asking you if that reconciliation needed to be made on shipments between States? A. I understand it to be a reconciliation of forms and not figures, Mr. Wooden.
>
> Q. Perhaps I am in error. You do not know of any reconciliation of figures? A. No, and so far as I know that was not considered by that Committee."[6]

On December 3, 1935 Porter wrote Coffin, President of the Institute, enclosing a copy of the committee's report, and stated that the committee had gone a good deal further than its authority and made suggestions applicable to the whole industry and not merely to Districts No. 1 and No. 2 and suggesting that if Coffin saw fit he might bring the matter to the attention of the Trustees, or refer it to the Committee on Forms for further study.[7]

The report as circulated to the members of the Northeastern Division summarized the several and diverse requirements of statistical reports then being rendered and recommended that for the purposes of such reports there be a definition of "shipments" limiting it to various types

[6] (C) Tr. 4428-29.

[7] Com. Ex. 230 N.

of Portland cement, that the basis of dues in the Portland Cement Association and the Institute be made uniform, and that——

> "#4. It is recommended that Mr. Mallory, as Statistician for The Cement Institute, attempt to devise two forms for the reporting of cement statistics,—one form to cover a monthly report on manufacturing capacity, shipments, stock, etc. and the other form to cover shipments into States. These forms to contain all of the information required by the Bureau of Mines, The Cement Institute and the Portland Cement Association. That Mr. Mallory then attempt to secure adoption of these standard forms by all of the parties involved to the end that member companies may have their clerical work reduced and that all agencies will receive the same statistical data.'"[8]

The record does not disclose what action, if any, was taken upon the report of the Committee, either by Districts No. 1 and No. 2 or by the Institute.

9. Use Made of Statistics

Neither the Articles of Association of the Institute at any time, nor any action taken by any of its officers or trustees, required any member of the Institute to submit statistical data or directed any member of the Institute as to the way in which it should use statistical data received from the Institute.

Statistical data issued by the Institute has never made any reference to price[1] and its reports have invariably been issued without comment.

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[8] Com. Ex. 1026 A-E.

[1] Reiter, General Manager, Institute (C) Tr. 16808-09.

Company representatives denied that their companies ever used statistical data in support of any agreement to limit, divide or allot business.[2]

The use made of statistics generally and those of the Institute particularly varied a good deal in the different companies according to the testimony of their officers.

Some companies, particularly the Pacific Coast companies, did not use the statistics at all.[3] Others used these

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[2] See, Plan for Sharing Available Business under the NRA Code, Part XII, Sec. C 3, p. 2126 *et seq.*

Bessemer: Warren, F. B., Vice President (R) Tr. 32219.
Coplay: Blum, President (R) Tr. 48100.
Cumberland: Pearson, Secretary (R) Tr. 39872-73.
Dewey: Moore, R. W., Vice President (R) Tr. 46733-34, 46839-41.
Federal: Bates, J. E., Sales Manager (R) Tr. 30483-84.
Glens Falls: Titsworth, President (R) Tr. 47890.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29510.
Hermitage: McGovern, Sales Manager (R) Tr. 36107-08.
Keystone: Scott, President (R) Tr. 27405-07.
Missouri: Alexander, President (R) Tr. 37182-83.
National: Dannelly, Vice President (R) Tr. 39591-92.
Northwestern States: MacDonald, Vice President (R) Tr. 36492-93.
Peerless: Russell, Vice President (R) Tr. 34218.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38469.
Southern States: Elcock, Vice President (R) Tr. 37598-99.
Southwestern: Blair, W. R., Sales Manager (R) Tr. 39148.
Southwestern: Warren, G. E., Vice President (R) Tr. 29160-61.
Volunteer: Lewis, Manager (R) Tr. 31405.
West Penn: McKee, Vice President (R) Tr. 27845.
Wolverine: Nelson, Vice President (R) Tr. 36036-37.

[3] California: Duque, Vice President (R) Tr. 42494.
Northwestern Portland: Hollister, President (R) Tr. 48116-17.
Pacific: Keller, Secretary (C), Tr. 9166-68.
Southwestern, Cal.: Merrill, Vice President (R) Tr. 47669.
Superior Portland: Tongue, Secretary (R) Tr. 42895-96.
Volunteer: Lewis, *supra*, Tr. 31405.

statistics only until those of the Bureau of Mines became available.[4]

The principal use made of the Institute's statistics apparently was to determine whether the sales department was gaining or losing its position in the total sales of the market in which it made sales. Where it appeared that a company was falling off, its sales managers got after their salesmen.[5] However, for this purpose several companies found that the Bureau of Mines' report of shipments into states was more helpful than the data published by the Institute though Institute data came in more promptly.[6]

Typical of the testimony as to this use of Institute and Bureau of Mines statistics is the testimony of Brobston, President of Hercules and formerly an officer of the old Dexter Company:

> "Q. You mentioned a moment ago that you use certain reports on business conditions and reports

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[4] Hercules: Brobston, President (R) Tr. 26239-41, 26246-48.
North American: Porter, President (R) Tr. 33998-99.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38467.

[5] Cumberland: Pearson, Secretary (R) Tr. 39871-73.
Hawkeye: Manley, General Manager (R) Tr. 41675-82, 41921-23; Resp. Ex. 3380 A-D: Memo to Hawkeye Salesmen.
Monarch: Brooke, Vice President (R) Tr. 42316-17.
Peerless: Russell, Vice President (R) Tr. 34298-300; Resp. Ex. 2416: Memo to Peerless Salesmen 3/11/35.
Universal Atlas: Reiter, Vice President (C) Tr. 16812-13, 17142-43.
West Penn: McKee, Vice President (R) Tr. 27831-32, 27834-36, 27844-45.

[6] Alpha: Codgan, Vice President (R) Tr. 23922-23.
Dewey: Moore, R. W., Vice President (R) Tr. 46839-41.
Hawkeye: Manley, *supra*, Tr. 41675-78.
Hercules: Brobston, *supra*, Tr. 26237-38.
Keystone: Scott, President (R) Tr. 27402-05.
North American: Porter, *supra*, Tr. 33775-78; Resp. Ex. 2395.
Penn-Dixie: Browder, *supra*, Tr. 38467-69.

on the construction industry. Did you use any statistics on cement when you were with Dexter Cement Company? A. I used all the statistics I could get, the same as I do today.

Q. How long have you made a practice of following and watching the figures of the Bureau of Mines? A. Ever since I got them, which was very early in my connection with the Dexter Company.

Q. Did you get them as early as 1900? A. That was the first year I was there. I don't know whether I got them then, but I certainly got them early in my connection with the Dexter Company.

Q. And what use did you make of them? A. The same use as I do today. I check my sales with the sales shown in the district, and use it as a guide as to what I should produce, and what my sales department should sell.

Q. How did you decide what you considered to be your share of the business? A. I had these figures for a good many years, and I had the figures of the sales of the Dexter Company in good years and in bad, and I checked those sales against the total sales from the district, and I figured that my sales department should at all times get as much as I had gotten over a period of years and if they fell behind that, I got after them. If they went ahead, I didn't say anything. That was what I wanted, but I had a pretty good guide at the Dexter. For three consecutive years we ran 363 days a year. We shut down only for Christmas and the Fourth of July. I had an exact figure as to what proportion of the total shipments in the district my shipments in those three years were.

Q. Generally, what period of time have you been talking about, 1904 to 1926? A. You asked me about Dexter. That covers my whole experience with Dexter. That covers the whole time that I was connected with them.

Q. Did you make any effort to go after new business, more business? A. We tried to increase our business in every way possible.

* * *

Q. Were you interested or did you care, particularly, how the balance of the shipments in your district was divided among other companies? A. I didn't have the faintest interest in that, Mr. Leisure. I was only interested in what I could get.

Q. Now you say you don't know of any of the Mallory statistics you used then. Do you receive those statistics today from The Cement Institute? A. I was going to say we receive statistics from The Cement Institute, yes.

Q. And how do you use those figures as compared to the way you used the Bureau of Mines' figures, let us say, when you were with the Dexter Company? A. About the only thing I use of the Mallory—or, you say Mallory; I always refer to them as the Cement Institute statistics. About the only use I make of them is to use the statistics on shipments temporarily until I get the Bureau of Mines' statistics.

Q. Then you use the Bureau of Mines' statistics still? A. I fill in the Bureau of Mines' when I get them.

Q. And do you use the Bureau of Mines' any differently today than when you did when you were with the Dexter Company? A. No different at all.

Q. Is there any advantage to you, Mr. Brobston, in having the statistics furnished by The Cement Institute? A. I should say there was a slight advantage. I get the figures of shipments about four or five weeks earlier than I get them from the Bureau of Mines.

On the figures that I keep I fill the figures from the Mallory or Cement Institute statistics in with lead pencil and when I get the Bureau of Mines, I rub them out and fill in the figures.

Q. Is that the only reason why you use the figures from The Cement Institute? A. I have no further use for them, no.

I might ask you in that connection, Mr. Leisure: You are referring merely to the monthly figures of shipments, etcetera, that we get?

Q. Yes."[7]

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[7] (R) Tr. 26237-41.

Reiter, Vice President, Universal Atlas, also testified as to the use of Institute statistics by Universal Atlas and their importance in following trends and discovering where sales effort should be made:

> "A. They are of great service, and I use them constantly to compare figures of our own sales with figures of the previous year, and to determine whether additional sales efforts are needed in certain territories, or not.
>
> Q. Now, when you saw these figures, will you explain whether or not they showed the trend of the markets in any direction in any way? A. Well, they would, of course, inasmuch as increases over the previous month, or over the same month, in the previous year, would show a more active market, and decreases would, of course, show a declining market.
>
> Q. Yes. A. And such information might cause a cement manufacturer, and has, in fact, caused me to increase or decrease our sales force of the Universal-Atlas Company in certain territories."[8]

Further questioned on the subject, Reiter testified:

> "Q. Well, will you explain your answer then as to what you mean by determining whether additional sales efforts were necessary? A. Well, if I were satisfied that sales by my company in one year were reasonable, and the total business in that area increased in the next year 10 percent and my sales increased 12 percent, I would not put forth any additional sales effort in that particular territory.
>
> Q. You mean you would not care to increase it 15 percent? A. I say if I were satisfied that—to specifically answer your question, I would be glad to increase it to 15 percent.
>
> Q. But if you had increased 8 percent whereas the industry as a whole had increased 10, then you would think increased sales efforts were necessary? A. Yes, bearing in mind, as I have said, if when I

[8] (C) Tr. 16812-13.

started to figure these changes I thought our sales were satisfactory in that particular territory.

Q. And you based that in part upon whether you were holding your own proportion by comparison with what had been the situation in the industry?

Mr. Leisure: I think the witness has already answered that question very clearly twice, your Honor. This is merely argument now.

Trial Examiner Norwood: I think he may answer that.

A. Well, of course, the only thing that I would have to compare my own sales progress against would be the total sales of all companies in any particular area.'"

Affleck, the President of Universal Atlas, was examined as to his attitude toward an effort to increase the proportion of a cement manufacturer's sales to the total sales of his competitors during a period of declining demand. He testified as follows:

"Q. Did you see anything wrong about a manufacturer trying to increase his percentage of total business when the volume was coming down or at any other time? A. I do not see anything wrong about it, but the unfortunate thing about it is——

Q. They ought to do it by lowering prices? A. It is futile because, if he gets away with it, it is only for a brief period.

Q. You say there is nothing wrong about him attempting to increase his percentage by lowering the price? A. Nothing wrong at all.

Q. Just a second. A. It is futile, yes.

Q. Even you—in other words—— A. If I could have gotten a bigger percentage by lowering prices, I would have done it and I wouldn't have thought anything about its being wrong, but I wouldn't have gotten away with it more than momentarily.

Q. You don't think a competitor ought to attempt to increase his percentage of the total volume

[redacted]

[9] (C) Tr. 17142-43.

of business by lowering price? A. You asked whether I think he ought not attempt to.

If he is my competitor, I would say he ought not to attempt to increase his percentage; but if it is myself, I think I ought to attempt to increase my percentage.

Q. As a matter of fact, however, you thought about it you didn't attempt to increase your percentage? A. No.

Q. So your practice was the same? A. We formed——

Q. Your practice was the same no matter what you thought your competitors' practices were? A. Well, we had had the rapid shrinkage in the selling price, and we went along with it, of course, as we had to do and curtailed our operations drastically and waited for a better time.

Q. You said—— A. We knew perfectly well we couldn't increase our percentage of the total. Didn't try to.

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

Q. You think it is futile for competitors to attempt to change their percentage of the total business that is available to the whole group? A. I don't think my opinion as to whether it was futile or not is important. It just is futile.

Q. Well, why? A. Because he can't get away with it?

Q. In other words, you don't think it is possible for a concern that has ten per cent. of the business this year or last year to make it fifteen per cent. this year? A. Oh, I didn't mean to convey that idea. The fact of the matter is, our percentage of the total underwent quite a severe shrinkage. We didn't get our percentage in 1931 or two, and others got more.

Q. And others got more? A. So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out. I am glad you corrected me on that. I wouldn't want the——

Trial Examiner Norwood: They could not do that with the method of giving secret prices?

The Witness: A secret really doesn't remain a secret very long.'"[10]

Executives of six respondents testified that they used the Institute's data as a basis for estimating production schedules. On this subject the testimony of Bowen, Vice President of Lehigh is the most comprehensive. He testified that his company used all available statistics in the building industry, including the Institute, Bureau of Mines, F. W. Dodge Corporation statistics, in helping the company to forecast its productions schedules:

> "Q. And what do you do with these reports? A. Consider them as part of the material and information on which to base our plan for the future. One of my duties is to keep in constant touch with our manufacturing department in the matter of making plans for future operation.
>
> In the ordinary course I will sit down with our operating people, periodically, and discuss with them operating schedules for the next three or four or five months, depending upon the circumstances.
>
> All of this statistical data is among the material, and is a part of the material from which I form the opinions which I use in my discussions.
>
> Q. As to these forecasts, then, how do you make your estimate for future business? A. The first item we would take into account is the contract for future delivery that we have on our book at the time, and on which we make the best estimate we can as to how much cement we are likely to be called on to ship on those contracts during the period we are considering.
>
> Then we estimate as best we can what tonnage we will be likely to get in the way of current or dealer business during the same period. Then we have got to estimate from the information we have as to the work coming out for bids in the immediate future; how much new business is likely to come into the market during the period, and how much we are likely to get and likely to ship on it.

[10] (R) Tr. 34932-34.

Those are the principal items, and, of course, in considering that, we are glad to have all the statistical information we can get because, at best, it is very difficult to make such an estimate, and even the most informed and best estimate we make frequently proves to be not entirely accurate.

Q. Do you use the statistical data of The Cement Institute in this connection? A. Yes, the statistical data of the Institute is one of the forms of information that we have at our disposal. I don't think it is any more valuable to me than any other because as far as the record of past shipments is concerned, that doesn't help for the future.

So far as the estimates of future construction go, they are, of course, simply based on the Dodge Company's estimates, and while they are very good and very skilled estimates they frequently don't work out, either.

Q. Does The Cement Institute statistical data give you any data on future business, or is it past shipments? A. The past shipments don't help us a bit as to the future.

Q. Which does it give you, I mean? The Cement Institute, I was asking you about. A. I have said that The Cement Institute shipment figures are figures on the past, and, therefore, are of no help in planning a future course, and their estimates for the future are merely based on the Dodge Company's estimate.

Q. Well, Mr. Bowen, from what you have told us, why do you continue to subscribe to the Institute service? A. Primarily because we are members of the Institute and the statistical information is one of the services that that membership gives us. We cover a rather wide territory and we are interested in all the information we can get.

We pick up all the hearsay in the trade. We get all the statistical data we can. We subscribe to all the services that furnish information to the construction business, and we subject all that information to our own check, based on information and opinion through our own reports, all that we have at hand, to make our plans, to make a complete estimate, so

that we can run our business as intelligently as possible."[11]

Scott, President of Keystone, testified:

"Q. Does your company use the statistics furnished by The Cement Institute to regulate your production? A. Well, only in the sense that it is just one more indication of activity; but there is no—it is just more statistical data on which we may base our plans, that is all.

Q. Then, do you or do you not use it to regulate your production? A. No, sir; we don't use it in the sense of any regulation.

Q. Have you ever had any contact with any of your competitors which influenced you in determining your rate of operations? A. No, sir."[12]

McKee, Vice President of West Penn, put it this way:

"A. They are a guide in estimating what we may reasonably plan ahead for in the way of production.

Q. Do you use them for any other purpose? A. None that I can think of.

Q. Well, then, Mr. McKee, is there any difference between the use you make of the Bureau of Mines' statistics and the use you make of the statistics furnished by The Cement Institute? A. No."[13]

Elcock, Vice President of Southern States, testified on the same subject as follows:

"A. Oh, I am interested in seeing how the business is going along, which one of my friends is doing a good business, and which one is taking a licking. That is the only particular interest I have in it.

Q. Do you obtain statistics of a similar character from any other source? A. Bureau of Mines.

Q. With respect to your local area, do you obtain

[11] (R) Tr. 26992-94.

[12] (R) Tr. 27416.

[13] (R) Tr. 27845-46.

any information with respect to contracts and consumption? A. Yes. That information is useful in projecting what you are going to do, figure out what capacity you are going to run your mill. It is particularly interesting right at the present time, because it shows prospects for better business down in my part of the country than any other part of the country."[14]

Blair, W. R., Sales Manager of the El Paso mill of Southwestern, received a letter from C. C. Merrill, Vice President and General Manager of Southwestern, dated November 16, 1936, with reference to a probable meeting of the Institute to be held in Chicago in December and advising Blair that if the meeting was held he should attend, and saying that the Institute, "must be kept up, as I am sure that under changed conditions we are going to have caused by the present legislation, as well as future legislation, I mean that the Industry is going to depend largely upon the Institute for uniform market, selling, and other conditions, so interest in the Cement Institute must be kept up."[15] Examined as to the meaning of this letter and the importance which Merrill placed on the future of the Institute, Blair testified:

"A. He was particularly interested, according to not only this but two or three discussions that we had on the matter, in statistics that were furnished him, his office, by The Cement Institute.

Q. And is that what you understood he was referring to in this letter, in the second full paragraph of the letter? A. Yes, because he took up with me and he expected me to correlate the operations of the plant with what I felt to be the sales conditions in our territory. He constantly checked on these statistics to see whether I was getting business in the territory in line with the figures shown by the

[14] (R) Tr. 87598-99.

[15] Com. Ex. 1270 M, N.

Institute for that territory, and he expected me to advise the plant whether to slow down or to increase its production in accordance with the conditions as they existed in the territory."[16]

Penn-Dixie found the Institute statistics useless for this purpose[17] and Dewey used only the Bureau of Mines figures.[18]

Executives of other companies testified in general terms as to the use they made of the Institute statistics and of statistics generally in the conduct of their company affairs.

On this subject Elliott, Vice President of Whitehall, testified:

"Q. Mr. Elliott, what use do you make of the statistics, production and shipment statistics, of the individual competitors—that is, your individual competitors—given to you by Mr. Mallory of The Cement Institute? A. We really do not make any special use. They are interested in knowing how the other mills are going, whether business is good or whether bad. We get the same information from the Bureau of Mines, and have for years.

Q. That is, showing individual companies? A. Oh, no, no, no, just the general business.

Q. Well, of what value to you and to what use do you put it; that is, this information as to particular individual competitors? A. Well, we do not put it to any particular use. The value is that it gives us an idea of the mills nearest, how they are running, whether they are busy or whether they are flat.

Q. Are you enabled to keep abreast of them in your production and shipments? A. Well, we produce as much as we possibly can. We sell as much as we can, but, of course, we know if the other fellow is not doing much, then we have to watch our storage to see that we do not get too much and can't operate over the winter.

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[16] (R) Tr. 39146-47.

[17] Browder, Traffic Manager (R) Tr. 38467-68.

[18] Moore, R. W., Vice President (R) Tr. 46839-41.

Q. Is there any other use to which you put those statistics from Mr. Mallory; that is, as to individual companies? A. No, sir.

Q. Are they of any value to you that you can think of? A. No, sir; I would say not.

• • •

Q. Well, why are you willing for Mr. Mallory to disclose to your competitors such details of your business when you are not willing for the U. S. Department of Commerce Bureau of Mines to disclose it? A. I do not believe we ever gave any thought to it. They asked for the figures and they were figures that could be obtained, and it could easily be found, I suppose, even from the Bureau of Mines' figures by a matter of elimination.

By Mr. MacIntyre:

Q. If you did not know it was your own could you from the Bureau of Mines determine figures for all of the companies? A. No, but I would come pretty close to how they were operating in the district in which we were operating, and it would not mean much to us, which company was operating more than the other."[19]

F. B. Warren, Vice President of Bessemer, said:

"A. It is a sort of a gauge to accumulate, in one place, handily, comparative data as to what the construction industry has been doing, the progress. Now, it is largely information that is available to us in other forms, but this consolidates it, and we find out what the total building has been this year and last year, and what may be ahead for us.

I use it, personally, as a means of keeping aware of what is going on in the industry that I am in.

Q. Did you subscribe to any other statistical services besides The Cement Institute? A. Oh, yes, we have a great many of them."[20]

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[19] (R) Tr. 28700-03.

[20] (R) Tr. 32225.

Russell, Vice President of Peerless, when asked as to the use he made of statistical information from the Institute, replied:

> "The only use that I make of it is to read it when it comes in and form an opinion from that information as to the volume of cement consumption in the United States and thereby have some knowledge of the extent of the industry, particularly in the territory in which we are operating."[21]

The testimony of Nelson, Vice President of Wolverine, is that:

> "I look over this statistical information to see whether anything contained in it might be of interest to us. Generally speaking, we use it merely as a means of keeping posted on matters of general information. We also receive Government reports made by the United States Bureau of Mines which cover substantially the same ground, but which are received at a considerable later time."[22]

To the same effect is the testimony of Letzkus, Sales Manager of Pittsburgh,[23] Lucas, Vice President of Petoskey,[24] Dawson, Vice President of Medusa,[25] and Horner, President of Kosmos.[26]

Hartley, Sales Manager of South Dakota, a non-respondent, testified that he received the 10th of the month report although his company was not a member of the Institute. Stating that the information was of no particular value to his company, Hartley said:

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[21] (R) Tr. 34297.

[22] (R) Tr. 35922-23.

[23] (R) Tr. 37710.

[24] (R) Tr. 38757.

[25] (R) Tr. 40074.

[26] (R) Tr. 36822-23.

"Q. Did the 10th of the month report have any advantage to you over the report of the Bureau of Mines? A. No, sir.

Q. Was it of any benefit to you, or what interest was it to you to have shipment figures of individual competitors? A. No particular advantage.

Q. Would it give you any knowledge of the demand in a particular territory? A. No, not necessarily so, I do not think it would make any difference as to that.

Q. Have these Institute statistics had any influence upon your production schedules? A. No, sir.

Q. The record shows that you stopped sending shipping figures to The Cement Institute in 1936, Mr. Hartley. Why did you discontinue at that time? A. From our point of view, the information was of no further value to us after the Code was out. There was no reason why we should continue to get the reports."[27]

Titsworth, President of Glens Falls, interrogated as to the value to him of Institute statistical information, testified:

"A. It is as valuable as other statistical information which I gather from all possible sources, like the Bureau of Mines, and others.

Q. Do you make any different use of it, then, than you make of the statistical information concerning the cement industry that you get from the Bureau of Mines? A. Not the slightest."[28]

Alexander, President of Missouri, testifying as to his limited interest in the Institute statistics and their value because of the forecast of consumption not elsewhere obtainable, stated:

"A. I was only interested in Mr. Mallory's forecasts on probable demand; paying no attention to these other statistics because they seemed to me to be more or less incomplete.

[27] (R) Tr. 41544-45.

[28] (R) Tr. 47915-17.

Q. Do you mean to say, as a business man, Mr. Alexander, that you have no interest in knowing what your competitors are producing and shipping? A. I have an interest in knowing what cement consumption is, and get the information from the Bureau of Mines, and I can compare ours with it.

Q. Will you answer my question, please?

Trial Examiner Norwood: Answer his question.

A. No, I am not interested in what my competitors are doing. I am interested only in what we are doing, and how consumption is running.

* * *

Q. You never objected to Mr. Mallory identifying the production of shipments of your company in the reports that he made to your various competitors? A. No. We have no particular secrets about out shipments, production."[29]

10. Supply of Cement and Mallory's Statistics

Members of the industry from time to time gave expression of views on the importance of the relation between the supply of cement available and the demand for it. W. S. Mallory, former president of Edison, who between 1926 and 1933 operated a statistical service of his own and who after September 1933 was Statistician for the Cement Institute, prepared statistical data and corresponded with manufacturers upon this subject.

a. Early Work: 1909-1915

[The minutes of the A.A.P.C.M. of September 8, 1903 contained a statement prepared by Mr. R. W. Lesley, in which he said:

"Owing to the construction of many new works, and the enlargement of old works, there has been during the Winter and Spring months of 1900 and

[29] (R) Tr. 37438-40.

1901, an evident over-production of cement at that time and a material dropping of prices.

This condition was an evident one at the time, and caused great loss to the cement manufacturers, though as an actual fact there was no real over-production of cement, the market absorbing all that was produced, and is at the present year taking more cement than can be produced by American works.

The consumptio.. of cement is at its highest in the months from August to November. The contracts on which it is used are let in the early part of the year, but work does not begin until the summer is pretty well advanced. During the Winter months the mills run right along—by the Spring have accumulated a large stock of cement, and about the time contracts are to be let for work contemplated, the cement pressing upon the market is at its maximum. Consequently, the manufacturer with filled storehouses and in many cases exhausted capital, by reason of his production during the Winter months, is forced to make contracts at low prices and break the market, thus ruining the whole trade for the year.

It is this attempted sale of 'spot' cement, which really means the sale of 'future' cement, that affects the trade situation in the cement business. The manufacturer influenced by the Winter stock he has on hand, frequently is influenced by what seems to him large, but is actually a small quantity of 'spot' cement, to make contracts for 'future' cement running into periods of years. The reason for this in our business is that there is no market for 'spot' cement, but to sell it 'future' cement must be contracted for in vastly greater amounts.

To overcome these difficulties and give stability to the market—find a market for the surplus product and at the same time keep the price within reasonable limits, two obvious means suggest themselves to control overproduction, viz.:

(a) A consolidation of the cement industry by purchase; or,

(b) A selling agreement among the manufacturers with a fixed price, and a penalty for selling below the same.

Neither of these seems feasible at the present time. The first, because of the large capital involved, and the difficulties of obtaining agreement of the principal manufacturers; and the second, because of the question of its legality under the Addystone Pipe Case and other similar cases recited under the Sherman Trust Law."[1]]

[At a meeting of the same association in New York on December 13-14, 1904, the report of the executive committee says:

"The year just closing has been one of the most unsatisfactory in the history of the industry. Owing to a large accumulation of cement in the storehouses at the mills, an unusually large stock of foreign cement in the warehouses in the cities along the Atlantic Coast, to a late spring, and labor troubles in the building trades, the manufacturers found it necessary, in order to move stock, to name the lowest prices ever quoted for American Portland Cement. The tendency of the market was downward until midsummer, when the surplus stocks having been largely disposed of, a halt was called and prices remained stationary until September, when a slightly increased demand induced some mills to make a feeble effort to advance them.

That the year's business has proved unprofitable is beyond question and that it is due entirely to the failure of manufacturers to get together is evidenced by the fact that the consumption has just about equalled the supply and that the mills will close the year with no more cement in the bins than should be carried to insure a well-seasoned product.

The coming year promises an increased demand and at the same time an increased production. To obtain better prices, it is absolutely necessary that we should refrain from stocking up during the Win-

[1] Com. Ex. 3235 D-E.

ter months and avoid, as far as possible, the naming of prices in advance for next season's delivery.

In short, the results of the business of 1905 depend largely, if not entirely, on the action of the manufacturers. * * *"[2]]

[Mallory, early displayed an interest in cement statistics and the relation between productive capacity, production, prices, and demand. At a meeting of members of the A.A.P.C.M., April 13-14, 1909, Mallory, then an officer of the Edison Company, said:

"* * * Now, the next and most important thing is, are we going to avail ourselves of this condition and obtain a fair price for our product and earn an additional profit for our stockholders, or are we going to be as foolish as we were in 1905, when we actually shipped 500,000 barrels more than we manufactured, and because we did not understand the conditions because we lacked confidence in each other, we obtained a selling price of from seventy to eighty-five cents, Lehigh Valley mills, when the conditions warranted prices fifteen or twenty cents higher? Or, in other words, we threw away from $5,000,000 to $7,000,000 additional profit which we should have had, and which conditions warranted our taking."[3]]

[At a meeting of the same Association on December 13-14, 1910, Mallory then President of the Association,[4] said:

"It is a very simple matter, if we can get the thing under one control, to cut off a certain amount of the excess production. But there is no use in trying to keep the prices right in any other way than by cutting down the production. The only way that I can see we will ever arrive at a suitable price is by

[2] Com. Ex. 3235 T-U.

[3] Com. Ex. 3235 Z-40.

[4] Com. Ex. 3235 Z-65.

getting some method, either automatic or otherwise, to cut the production down to what the consumption is, to meet the requirements of the market.'"[5]]

[And in June, 1911 at a meeting of the Association at which Mallory reported for the Committee on Statistics, the following conversation took place:

[Italicized part quoted in Fdgs. Par. Fifteen (b)]

"Mr. Mallory: I doubt very much if the increase in shipments is going to be any more than it was last year. In fact, it is my opinion that it will not be as much. I doubt very much if they will be as great for the next seven months of the year as they were for the same corresponding period last year.

Mr. Bissell: Do your figures show that for the first five months of each year we ship practically 25% of the entire yearly shipments? I was under the impression that that was about the experience.

Mr. Mallory: That the first five months of the year—each year—we ship about 25% of the entire yearly shipments?

Mr. Bissell: Yes, sir; I think I have some figures that would aid you on that, if they do not already show it.

Mr. Mallory: *Yes, sir—that is right, from 25 to 30%; but in the meantime if we continue manufacturing at the present rate—and that is what we are doing now—if we continue making cement for the balance of the year as we are making it now, it means just one thing—trouble.*

Mr. Kelley (Virginia): Now, you were speaking of the stock on hand on the first of January of each year; can you tell me what was the stock on hand on the first of January of each year?

Mr. Mallory: Yes, sir; I can. Do you want it?

Mr. Kelley: Yes, sir.

Mr. Mallory: In 1907, on the first of January, we had on hand 4,400,000 barrels. In 1908 we had 5,400,000. In 1909 we had 8,000,000. In 1910 we had

[5] Com. Ex. 3235 Z-69.

6,500,000, and in 1911 we had about 8,800,000 barrels.'"[6]]

[Later, at the same meeting, Mallory stated:

[Italicized part quoted in Fdgs. Par. Fifteen (b)]

"It is not the distant future that should trouble us, but the near future—the future that is right almost upon us. The question is what to do for the balance of this year. That is the thing that concerns us.

Now, in regard to that, I have only this suggestion to make. It is illegal for us to make any agreement that will curtail our production. It is illegal for us to enter into any agreement which will reduce or curtail our production for a given time or for a given amount. *I cannot speak for all of the companies. There is one, however, I can speak for, and that is the Edison Company;* and so far as that Company is concerned, we have decided to do this: We know what our shipments were for the latter part of last year, and we have estimated what our shipments should be for this year. *We have decided on an amount of stock and clinker that we will accumulate, and the moment our shipments fall off in volume, and we have that stock on hand, that moment the Edison Company shuts down.* * * * Without presuming to advise, *I cannot help saying that it seems to me that every company represented here could do the same thing. If they would do so, that would be a form of co-operation that would be very effective in remedying present conditions, and a plan of operations that would absolutely and effectively solve our problem of over-production for the balance of the year,* and put all of us into good shape for the winter."[7]]

and

["*Mr. Kelly (Virginia): Then, in your opinion, the crux of the whole matter is this: the people who have thirty days' production on hand should shut down for a time?*

[6] Com. Ex. 3235 Z-97.

[7] Com. Ex. 3235 Z-100.

Mr. Mallory (Edison): Well, every one can do as they think best, but that is what we are going to do. We think that is the only practical way to handle the situation—curtail our production."[2]]

[In January, 1913, Mallory, Chairman of the Committee on Statistics of the A.A.P.C.M., wrote to Morron, President of the Eastern Cement Association, enclosing a report, and stating in a postscript:

"I have sent a duplicate of the above letter to every member of our Association, and also to the Companies who are not members, as I believe it is desirable to have them all thoroughly understand the danger of over-producing in Winter months."[3]]

[Minutes of the A.A.P.C.M. in September, 1915 under the heading "Committee on Statistics" reveal that the question of a proper capacity rating for mills was under discussion and the proposed use of 85% of maximum capacity as a basis for such rating was criticized by Newberry of Sandusky. The minutes then record:

"Mr. Mallory (Edison): I think Mr. Newberry is under a little misapprehension on the eighty-five per cent. 85% does not nor is it intended to apply to any individual mill. It applies only to districts. It is true that his mill and other mills can probably run more than 85% for a year. But if you take the district you take all the mills in a district. There are mills that on account of lack of storage capacity and other facilities cannot run 85%. That figure has been checked up in two districts. One of them was the Lehigh Valley district in 1906. You know at that time we had a runaway market. Prices went up 25 cents a barrel and every mill ran to its maximum capacity that year. As taking the maximum monthly capacity made by each of the mills that year, multiplying that by twelve to get the theoretical

[2] Com. Ex. 3235 Z-102.

[3] Com. Ex. 2897; (C) Tr. 17445.

natural capacity, then taking the actual amount of clinker that was made during that year, it was eighty per cent. So that in adopting the 85% the Statistics Committee thought that they were giving a fairly accurate figure. You gentlemen know that it is impossible to run some mills full. It is true they can fill their stock-house with cement and then they can store clinker, but we are not shipping clinker. It is cement that we are shipping. And while a company can go on accumulating clinker for one year or more, there will come a time when they will have to stop all their mills for a period. And that is the way the 85% was arrived at, not for individual companies but by districts, all the mills in a given district.

Mr. Newberry (Sandusky): I think just for that reason it is a wholly artificial and misleading figure. The capacity of a mill is the maximum which it can produce. It is not the amount which the manufacturer thinks it is best to produce. If a mill running less than capacity makes only 85%, then it is operating only 85% of maximum capacity, and we want maximum capacity, not 85% of the maximum capacity, or what per cent the manager thinks it is worth while to make.

The President: 85% of efficiency is what we get."[16]

b. 1926-1933: During Mallory's Subscription Service

From 1926 to 1933 Mallory rendered a statistical service of his own based on Bureau of Mines and Dodge Corporation figures,[1] which he sold to between twenty and forty cement company subscribers on an annual fee basis.[2] From Dodge figures of building contracts actually awarded, Mallory estimated the probable consumption of cement in-

[16] Com. Ex. 3236 Z-96.

[1] Mallory (C) Tr. 17208. There were 45 subscribers in the period July 1, 1932 to August 31, 1933. Com. Ex. 3008 A-C.

[2] Id., Tr. 17197-99.

volved in these contracts. From Bureau of Mines data as to stocks on hand at the end of each month he computed days' supply. He also issued a tabulation of estimated clinker capacity of each district, clinker production and the percentage of capacity represented by the production, and a similar tabulation for cement.[3]

In August, 1928 he wrote to Powell, President of Southwestern at Los Angeles, quoting from Mr. Charles Pies, Chairman of the Link-Belt Company, as follows:

> "'Bituminous coal mining is an outstanding example of an industry that has a restricted market. To a large extent building, together with the industries dependent on it, is confronted with the same condition. The fact that output cannot be increased ad libitum is often overlooked in mass production industries. The economies from large-scale output are constant temptation to increase production first and worry about sales afterward. Efforts to sell goods in excess of consumption have added very considerably to the costs of marketing. In most industries, including those outside of the mass production field, distribution has become a major problem.'"[4]

On September 4, 1928, Mallory wrote Powell:

> "The method, so successfully used by the General Motors Corporation and others, of keeping production in balance with the demand, permits much closer co-operation against competing industries.
>
> The work I am doing gives a reasonably accurate idea of the coming demand for each group of plants and is sufficient to enable each plant to keep its production in balance with the total demand, if it so desires.
>
> I feel very safe in stating there is nothing your industry can do which will bring greater returns, over a period of years, than the adoption of the pol-

[3] Mallory, Statistician, Institute (C) Tr. 17204-05.

[4] Com. Ex. 1277 B.

icy of only manufacturing what the demand requires and using your energy against competing materials.'"[5]

In 1929 Mallory prepared and sent to his subscribers[6] a chart showing a rising curve between 1920-1928 of barrels of cement used in general construction and in pavement construction and a price decline from $2. per barrel at the end of 1920 to $1.55 in 1928. He also showed the relation of barrels of cement to total building which showed a decline in the ratio of cement between 1925 and 1928. In the corner of this chart he wrote the following deductions:

"*Fallacy #1.* That a reduction in the price increases consumption. Not so because cost of cement is less than 2½% of total cost of all building; results 1924-1928 show smaller increase during period of largest price decline.

Fallacy #2. That full production pays because it reduces the manufacturing costs. Note the following results

Excess Production
United States 1920-1928 14/10%

Decrease in price
United States 1920-1928 22 2/10%'"[7]

On May 14, 1929 Mallory published what he described[8] as a warning to the cement industry that it had passed the peak of building construction.

After referring to the fact that in the thirty-seven states covered by F. W. Dodge Corporation Statistics the value of building contracts awarded in April, 1929 was less

[5] Com. Ex. 1271.

[6] (C) Tr. 17296.

[7] Com. Ex. 2887.

[8] (C) Tr. 17306.

than those awarded in April, 1928, Mallory went on to say, among other things:

"That you may have a clear picture of what has happened during the past five years (1924-1928), I give the figures showing the changes in the building demand; the cement used for general building (I have deducted the pavement and export shipments) and the average 1927 factory price. (The 1928 average price has not yet been published, but I believe it will be lower than that of 1927.)

	Building Contracts Awarded	Barrels of Cement used for all Building		Average Factory Price
1928	$6,628,000,000	125,400,000	(1924)	$1.81
1924	4,659,000,000	112,000,000	(1927)	1.62
	1,969,000,000	13,400,000		.19
	Increase 42%	Increase 12%		Decrease 10%

This shows that with an increase in the building demand of 42%; an increase in the cement used for building of 12%; (the pavement increase was 50%), that your average factory price decreased over 10%.

* * *

Due to the fact that your stockhouses are practically full, it does not make the slightest difference what your commercial history may be during the next few years, your industry can only produce just what it may ship, in other words, unless more stockhouses are built, which does not seem probable under the existing conditions, your industry is forced to keep its production and shipments in balance, until there is another considerable increase in the demand for your product.

It is not even a question of 'tonnage or profit', because you cannot have tonnage on account of your stockhouse limitations, the only question therefore to be decided is, will it be a reasonable profit or no profit.

I feel very certain if the physical stockhouse limitation, which exists in most districts, is used as

the foundation on which to build your structure, which can be designed to cover the existing inequalities, and each company will realize and act on the fact, that the district in which its plant or plants are located, can only produce what is shipped, and to balance its production with the demand, whatever it may prove to be, is good sound business and it is probably the only way in which your industry can obtain a reasonable profit during the next few years."[9]

A copy of this communication written on Mallory's stationery but not addressed to any person and not signed by anyone was admitted in evidence and at the end appeared further material which Mallory testified he had placed there after 1933 as evidence that his judgment in 1929 had been vindicated by the facts.[10] The additional material read:

"Results for the Five Year Period. (1929-1933)

	Cement Production Barrels	Shipments Barrels	Average Factory value
1929	170.646.000	169.868.300	$1.48
1930	161.197.200	159.059.300	1.44
1931	125.429.100	127.150.500	1.11
1932	76.740.900	80.843.200	1.01
1933	63.473.200	64.282.800	1.33
	597.486.400	601.204.100	

The financial results of the reports made to Price, Waterhouse & Co. show there was 'practically no profit' during the five year period.

The above totals show the shipments were more than the production."[11]

On November 19, 1929, Powell, President of Southwestern, following a meeting of the Portland Cement Associa-

[9] Com. Ex. 953-2 X-2 Z.

[10] Id.

[11] Com. Ex. 953-2 Z.

tion, wired from Chicago to Merrill, a Vice President, in part as follows:

[Italicized part quoted in Fdgs. Par. Fifteen (d)]

*"Very quiet meeting light attendance * * * consensus general opinion if curtailment production could be brought about other grievances would soon be cleared up* Rumors Eastern Territory will have increase shortly Blaine states looks encouraging."[12]

The date of the wire will serve to remind that it was a time of business panic and confusion.

In a letter dated January 10, 1929 written by W. J. Jennings then Assistant Manager of Southwestern, Ohio,[13] to Merrill, Vice President of the Company, the writer refers to a meeting of the Cement Institute and to C. A. Irvin, Chairman of the Advisory Committee of the Chicago Division. The letter was evidently written in 1930 and refers to the meeting of cement manufacturers on January 7 and 8, 1930 in Chicago, at which the Chicago Division of the Institute was formed.[14]

The letter states in part:

[Italicized part quoted in Fdgs. Par. Fifteen (d)]

"The meeting of this Cement Institute started in the morning and we were still at it along about 8 o'clock at night, and I want to say it was probably the most intensive meeting ever held by the cement industry. * * *

* * *

I would like to tell you that during the meeting Harry Jennings of the Wabash came over and sat down beside me, the first time in the history of my advent into the cement industry that he has ever approached me in any way, and he tried to be

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[12] Com. Ex. 1270 A.

Blaine is probably Blaine S. Smith, Vice President of Penn-Dixie.

[13] Jennings, Former Manager (Osborn), Southwestern (C) Tr. 11160.

[14] *Supra*, Part X, Sec. A 2 b, pp. 1804-05; (C) Tr. 11169.

friendly. A little later when the naming committee was appointed, with Charley Irvin as chairman and Schmutz and Harry Jennings on this committee, I felt there was no chance of my being appointed on the executive committee, but surprising as it may seem Harry Jennings was for having me on the executive board, and both he and Sam Stephenson came to me afterwards and promised their support in any controversy that I might have with any of the Board members, and in fact they have agreed that instead of believing everything that is said, if any trouble comes up in our territory, that they will come to me to thresh the matter out before retaliating. I thoroughly believe we are in a fair way to get some place with both Wabash and Superior.

Schmutz of Bessemer is trying very hard to convince me that he is not so bad as he has been painted, and after I was appointed on the Executive Board of course the Ohio fellows all came around to congratulate me and take the opportunity to tell me that none of them were as bad as they have been made out to be. Mr. John also came up and asked me if I had been to dinner, along about 7 or 8 o'clock in the evening and every one of the Ohio manufacturers were anxious to be friendly. Of course you can understand now that I am on this Executive Board I have a little the whip-hand of the situation as all contracts, all products plants and central mixing plants will have to go before the Cement Institute manager in Chicago to see that there are no duplications, in other words that these fellows are not trying to sign up with several different plants at the present low prices, and naturally I will see all of these and we will have to determine who really has the contract if there are a number of duplications.

• • •

[Italicized part quoted in Fdgs. Par. Fifteen (d)]

Now, Mr. Merrill, this formation of the Cement Institute is going to put a different aspect on the cement business in this territory. During this meeting, Mr. Mallory, who is statistician for the Cement

Institute[15] *and who has developed the amount of cement available for each plant throughout the U. S., was called upon to give the capacities of the different plants in the mid-west district.* He spent some time in Washington recently to get all of this information from the records that are turned in to the U. S. Government. *He had us down at 1,500,000 barrels and he had Wabash down at 980,000 and they called on each one of us to state if these amounts named were anywhere near correct. I told them that we could manufacture a great deal more than this and that by the end of this year our capacity would be over 2,000,000. Harry Jennings stated that they also had a 2,000,000 barrel plant or would have by the end of this year. But they would not allow him any advance. I have a promise from Mr. Mallory that he will advance no one in this district until he advises me before-hand. This Mallory was very willing to do as it was after I had been appointed on the Executive Board!*

It is the idea of the Cement Institute to get all the member companies to reduce their output to 70% of the capacities allowed them by Mallory, and of course the price would then automatically go back to what it originally was, and some are talking of 40¢ over the present price. This operation on 70% capacity would continue until such time as the country was able to consume more or stocks on hand are reduced to zero."[16]

T. O. Bretherton, Sales Manager of Allentown, identified a memorandum initialled by him and addressed to Weaver, President of Allentown. The memorandum is undated and Bretherton could not remember the date.[17] In any event, it was at a period of time when many men in many industries and in public life were concerned about the dangers of "over-production". The memorandum said:

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[15] Mallory did not become Statistician of the Institute until 1933. Com. Ex. 606 I: Trustees' Minutes 6/27/1933, *supra*, p. 1935.

[16] Com. Ex. 1270 B-G.

[17] (C) Tr. 10533.

"As explained to you on the 'phone this morning, had an hour and a half talk with Mr. Hogan [vice president of Lone Star] and it was very interesting. * * * He discussed at considerable length the present ills of the cement industry. He believed the only thing that would actually correct the situation would be the curtailment of production over the Winter months by the Eastern mills.

At the Detroit meeting Sunderland and Rader of the Lehigh Company advocated this strongly. He stated, however, that Swett in the East was not in favor of it but that Rader had the ear of Young to all appearances.

Bill Kinney was leaving Mr. Hogan's office when I went in and asked me to have lunch with him which I did. When I arrived at the Biltmore he was talking to Bert Swett and Fairman of the Portland Cement Association.

Kinney is not very happy over the conditions in the industry today and the four of us stood around for a while talking. Swett ventured of his own accord that he believed the one solution of the problem, and one that would enable the industry to get higher prices quicker than anything else, would be the curtailment of production.

It is apparent from the above that Young has evidently expressed his feeling in this matter to Swett and he is now advocating it."[18]

An unsigned, undated and unaddressed memorandum introduced while Mr. MacIntyre, Attorney for the Federal Trade Commission, was on the stand and declared by him to have been furnished by Stone of Universal Atlas from his office files, but from its contents apparently prepared by Diamond, stated:

"Our competitors and especially those who have entered the field in recent years have not hesitated to use every possible advantage at hand in marketing their product and we fail to see why, as an old established company, we are not entitled to the advantage of our location.

[18] Com. Ex. 1430.

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

In the year 1930, according to Mr. Mallory's yardstick, we shipped only 4500 barrels in excess to our fair share of the business, which should be a clear indication that we have not abused our position.''[19]

c. As Institute Statistician: 1933-1937

Upon the revival of the activities of the Institute following upon the passage of the NIRA, the Trustees appointed W. S. Mallory, Statistician of the Institute.[1]

The statistical work distributed by the Institute to its members under his charge during this period is covered *supra*, pp. 1935-43. His work in connection with Institute efforts to prepare a plan for sharing available business under Article VI of the Code is covered in Part XII C 3, *infra*, p. 2126, *et seq.*

What follows below is a number of Mallory letters to members of the industry and statistical data prepared during this period and also prepared for use in this proceeding, none of which was part of the regular statistical service of The Institute. First is a letter dated November 15, 1933 to Coffin, President of Nazareth:

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

"I have carefully noted your letter in which you say 'It's mighty unfortunate that there are so few people in the industry who accept your figures on production as accurate.' This is a surprise to me since I tabulate the figures received from the companies and also check them with the monthly statement issued by the Bureau of Mines, and find that they agree.

You may be interested in the results of my last tabulation of the 1933 shipments (January 1st to October 31st), figured out on the percentage share plan. I know there are one or more companies in each district who have ignored this plan entirely

[19] Com. Ex. 2662 B.

[1] Com. Ex. 606 I: Trustees' Minutes 6/27/33.

and in the following calculation, I have omitted their shipments in order to learn the results of the operations of the companies who are more inclined to co-operate for the common good.

To enable you to understand just what I mean by 'out of balance,' I will explain it by using the figures of Districts 1 and 2 (Eastern Pennsylvania, New Jersey, Maryland, New York and Maine). In these two districts there are thirty-eight plants; I have deducted the shipments of one company which operates two plants; *the total shipments from the thirty-six plants for the ten months of 1933 (January-October) amount to 13,611,000 barrels and the 'out of balance' shipments are 549,000 barrels or 4% of the total shipments, which means that, if the 549,000 barrels were properly redistributed, each of the thirty-six plants would have shipped its percentage share of the total 1933 shipments.*

The following gives the results in the districts my work covers:

	Total Plants in District	*No. Plants in This Calculation*	*Out of Balance*
Ea. Pa., N. J., Md., N. Y. & Me.	*38*	*36*	*4.0%*
Ohio, Western Pa. & W. Va.	*19*	*16*	*8.1%*
Wis., Ill., Ind. & Ky.	*11*	*10*	*12.2%*
Va., Tenn., Ala., Ga., Fla. & La.	*19*	*16*	*7.4%*
Ea. Mo., Ia., Minn., & S. Dak.	*13*	*12*	*4.5%*
W. Mo., Nebr., Kans., Okla. & Ark.	*13*	*12*	*8.0%*
Texas	*8*	*8*	*13.2%*
	121	110	

Average for 110 plants out of balance 6.9%

Another interesting fact is that the nine companies which have three or more plants (Universal,

Lehigh, International, Alpha, Penn-Dixie, Medusa, Consolidated, Ideal and North American) are 14.1% short of their percentage share of the 1933 shipments."[2]

On January 27, 1934 Mallory, writing to McKelvey, Vice President of Alpha, concerning the plant shipments in District #7 said:

"In 1931 Plant 358 exceeded its quota share by 50% and there were five companies that were minus their fair share with six companies over. In 1932 the same plant exceeded its quota share by 106% and there were four companies that were minus with seven companies over. However, in 1933 the same company exceeded its quota share by 178% and there were eight companies minus and three companies over. In 1933 the excess barrelage shipped by Plant 358 represented 80% of the total number of barrels that were out of balance; by that I mean that the out of balance amount was 1,080, while the excess barrelage shipped by Plant 358 was 876. In prior years the percentage was very much smaller."[3]

Plant 358 was the Girardeau plant of Marquette.

On April 5, 1934 Mallory wrote to Coffin submitting a memorandum entitled "THE CEMENT INDUSTRY, PAST, PRESENT AND FUTURE", the opening paragraph of which read as follows:

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

"First I want to try and show that the theory that it is good business to increase the volume of shipments of any company in excess of its quota share by cutting the market price in order to reduce manufacturing costs is a very costly fallacy not only for the company, but also for the entire industry, I am, therefore, taking the five year period from December 31, 1927, when the average mill value per

[2] Com. Exs. 821-2 J, 821-2 K.

[3] Com. Ex. 808-3 H.

barrel for the United States was $1.62 to the same date in 1932, when the average price was $1.00 per barrel. These five years cover the period of destructive competition. I also desire to point out that under the conditions that now seem probable the same danger will exist in the next few years unless your industry develops some definite plan which will result in practical cooperation.'"[4]

This memorandum, revised and with the omission of the paragraph quoted above was sent to the members of the Industry on April 30, 1934.[5]

It concluded with the following paragraphs:

"May I ask every managing executive to study the enclosed chart which shows the production capacity of the United States for each year since 1900 (using the Bureau of Mines figures), also the total consumption of cement each year and the average net price, and then note the effect of the excess capacity during the periods from 1906 to 1912 and from 1926 to 1932 on the market price then let him also study the chart which shows the relation between the excess capacity and the net price in each district since 1920 and ask himself how, with the prospect of 30% shipments in 1934 and possibly a 40% demand in 1935 and 1936 for the United States and with at least 60% excess capacity, he can expect any stabilization in the cement industry with a living market price unless he is willing to have his company 'give something (cooperation) to get something.'

During the period from 1928 to 1931 I warned your industry many times that the excess capacity and a decreasing demand would result in destructive competition and I go on record now, in view of the past history of your industry, that unless some definite form of cooperation is adopted, which will put every company on an equitable basis, you are sure

[4] Com. Ex. 821 E.

[5] Com. Ex. 562-7 Z-8 D.

to go back to another period of destructive competition similar to that you experienced in 1931 and 1932.'"[6]

On January 17, 1935 Mallory wrote to McKelvey, Vice President of Alpha, enclosing a statement showing "the distribution of the 1934 shipments from plants on the basis of the present estimates of the clinker capacity of all the plants, both active and inactive.'"[7] He further stated that he could not make estimates of the clinker capacity for 1935 until he had knowledge of deductions to be made for the inactive plants of the smaller companies and the addition of the new plant of National. Scott, President of Keystone, wrote to Mallory January 25, 1935:

> "I am just in receipt of your record of shipments 1934 as compared with your estimate 1934 and I hasten you this letter of congratulation in the accuracy of your forecast.
>
> I think the closeness of the actual shipments with your estimate made early last year, is positively remarkable, and it should give you, as it does me, much faith in the factors which you employ in the preparation of these estimates."[8]

On March 19, 1935 replying to a request by H. M. McGill, President of the McGill Commodity Service, Inc. at Auburndale, Massachusetts, for comment upon an article which he had prepared dealing with cement statistics, Mallory wrote:

> "The average price you give represents only one plant and therefore does not present the real facts. The enclosed table of net mill prices is based on statistics furnished by the United States Bureau of Mines, which are compiled from reports from all the

[6] Com. Ex. 562-8 D.

[7] Com. Ex. 2888.

[8] Com. Ex. 2889.

companies in the United States, and gives the facts. The Buffington plant, whose prices you quote, is in District No. 5. Comparing your prices with those of the Bureau of Mines, you will find the following differences:

	Your Price	Bureau of Mines' Price
1929	$1.53	$1.47
1930	1.48	1.38
1931	1.18	.92
1932	1.16	.71
1933	1.45	1.45

On page 2 under 'Seasonal Characteristics' you state, 'In 1930 through 1933, the efforts of manufacturers to exert a greater control over production brought results.' The fact is that during the years 1931 and 1932 there existed the period of cut throat competition when the industry lost $40,200,000. (taken from reports of the companies) and no attempt at 'control' by the manufacturers was made. If you look at the stock on hand in April 1929, which is the beginning of the shipping season, you will find there was a stock of over thirty million barrels, which is approximately the maximum storage capacity of the industry. Hence, during the period from 1930 to 1932 inclusive the industry could only manufacture such tonnage as it shipped since the shipping season (April) started with practically full stockhouses and the industry could put back into the stockhouses only what it shipped during the following twelve months. Therefore, it was the physical limitations of the stockhouse capacity that controlled production.

During 1933 most of the plants operated only from four to seven months at reduced rates of production, and the total stocks were somewhat reduced.

We are enclosing herewith a chart which shows the total capacity and consumption from 1900 to 1934 inclusive and the net price from 1882. Our industry is sometimes criticized because it now has such a large over-capacity to produce. The estimated capacity shown on the chart is the maximum and is based on continuous operations for 365 days. It is

figured on the actual maximum production for three consecutive months for each plant. The practical capacity, however, is about 82% of the maximum capacity due to shut downs for repairs and other reasons. The increase in capacity up to and including 1928 was necessary to take care of the consumption—the excess capacity of 1929-1931 was not needed.'"[9]

Mallory prepared a table, undated, setting forth the per cent of shipments in relation to clinker capacity of the plants in the various districts from 1925 to 1933, inclusive.[10] The first and second district, as one marketing area, were grouped together. The clinker capacity is the figure taken in Mallory's method of estimate. In the reproduction of this exhibit set forth below in each grouping and in each year the figure which indicates the highest percentage of shipment to clinker capacity is starred (*) and the lowest crossed (†). (Averages not covering nine years are disregarded.) This table discloses that the same plant is only occasionally high or low in any two years and that there is no fixed relationship between the variations in these percentages for the different companies and the average for the entire district. Thus in the company averages for nine years (the right hand column) the percentages of shipments to clinker capacity (the highest is starred (*) and the lowest crossed (†)) in the first group range from 76.1% down to 52%, in the third district from 71.7% down to 51%, in the Michigan district from 71% down to 41.6%, in the fifth district from 82.7% to 55.5%, in the southeastern district from 69.7% to 38%, in the seventh district from 87.1% to 50%, in the eighth district from 69.3% to 50.5%, in the Texas district from 75.1% to 58.6%. In the three western districts the company averages are not set forth. The table is as follows:

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[9] Com. Ex. 2892.

[10] Com. Ex. 2895.

THE CEMENT INSTITUTE
11 East 44th Street
New York City

F.T.C. EXHIBIT No. 2895a

PERCENT OF SHIPMENTS OF CLINKER CAPACITY

EASTERN PENNSYLVANIA, NEW JERSEY, MARYLAND, NEW YORK AND MAINE

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District										
	Percent	89.4	84.6	82.9	75.8	71.0	65.8	55.6	33.3	22.9	63.1
Lehigh	200-207	89.7	84.5	71.1	67.3	64.3	54.6	54.1	32.9	23.1	58.1
U — A	208-209	96.8	91.0	89.3	81.6	77.9	71.1	51.0	36.9	22.1	67.9
Penn — D	210-213	95.1	85.2	86.8	82.1	73.7	61.3	57.3	36.8	23.0	66.5
Alpha	214-216	83.2	73.4	82.6	73.3	61.9	56.8	46.6	25.2	21.4	58.0
L Star	217	*99.2	†64.1	92.3	61.8	†45.5	68.0	70.2	36.6	25.0	60.1
"	218	88.9	80.1	81.7	88.8	72.5	67.9	81.3	*58.7	27.2	70.9
N. American	219-221	87.1	83.5	83.1	79.8	72.7	71.4	68.8	36.3	23.9	66.9
Lawrence	222-223	98.3	93.5	88.2	64.3	69.8	65.7	53.9	28.4	21.9	60.6
Vulcanite	224	84.5	89.3	84.7	77.8	65.7	54.4	55.8	22.9	15.2	61.1
Edison	225	87.6	91.1	86.6	*93.1	*93.1	77.2	66.0	36.4	25.0	72.9
Coplay	226	83.2	*94.8	79.4	71.9	63.5	59.3	37.8	23.6	19.9	59.2
Naz	227	92.9	74.9	*105.4	81.6	85.5	80.4	63.4	34.1	28.2	71.1
Hercules	228	82.3	77.8	81.0	72.4	64.1	72.6	45.7	27.2	21.4	59.0
Giant	229	78.6	82.9	73.0	64.4	59.9	†44.0	†31.0	19.3	15.6	†52.0
Allentown	230-231	83.0	85.7	98.2	90.8	88.5	79.6	65.4	40.5	35.6	70.6
Keystone	232	—	—	—	74.1	65.1	*91.8	59.1	40.8	27.7	#57.2
Glens Falls	233	†77.6	84.7	77.6	84.3	85.5	78.9	54.6	30.6	25.4	66.3
Bessemer	234	—	—	†46.2	61.3	65.3	71.3	38.2	†12.4	† 6.7	#42.8
Medusa	235	88.4	88.4	87.2	†56.6	75.5	66.8	39.7	37.0	14.1	53.6
Whitehall	236	88.7	85.1	96.4	90.5	84.8	82.0	*83.0	41.8	*28.5	*76.1

District Percent—Average for six years 53.8%; for seven years 57.6%.

* Highest percentage of shipment to clinker in this column.

† Lowest percentage of shipment to clinker in this column.

2001

F.T.C. Exhibit No. 2895a

OHIO, WESTERN PENNSYLVANIA AND WEST VIRGINIA

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District Percent	82.6	77.2	81.2	78.7	72.4	65.1	44.1	27.3	21.7	59.0
U — A	250	89.3	83.0	85.5	77.5	68.6	65.8	32.3	18.8	15.1	59.4
Medusa	251-253	81.3	73.7	81.2	82.2	68.2	45.9	39.4	†13.1	9.6	54.6
Alpha	254-255	83.8	66.1	71.2	65.7	†51.5	†39.7	32.6	25.4	23.2	†51.0
Bessemer	256	*90.7	74.9	86.0	95.0	93.3	82.2	39.3	19.2	15.8	63.8
Pitts P. Glass	257	84.0	84.2	78.7	84.7	84.1	86.3	54.4	37.1	23.0	66.2
S. Western	258	81.9	*90.7	74.7	84.7	77.4	82.7	66.3	37.6	27.5	67.7
West Penn	259	—	—	69.5	59.8	71.0	58.7	†29.0	17.0	18.8	#42.5
Green Bag	260	—	—	†57.1	76.3	70.7	66.2	58.8	30.8	24.3	#52.8
" "	261	—	—	—	—	78.7	76.2	64.6	39.0	30.7	#56.1
Standard	262	†42.2	89.2	87.1	92.8	*95.6	73.4	71.9	43.2	34.8	*71.7
Castalia	263	69.9	63.4	77.2	70.7	75.2	72.1	30.1	14.8	† 8.9	52.8
Diamond	264	72.0	68.9	68.7	73.0	64.0	63.5	41.1	40.0	18.2	56.2
Wabash	265	—	67.8	88.0	*95.8	88.6	68.2	64.3	55.1	40.4	#68.0
Superior	266	56.0	†62.9	76.7	†59.0	63.1	51.3	34.0	38.1	32.0	52.2
Lehigh	267	86.7	83.0	*104.7	69.3	57.3	55.8	32.8	21.0	25.4	65.0
Standard L. & Stone	268	—	—	—	88.1	69.4	*104.7	*74.1	*56.2	*63.6	#74.8

District Percent—Average for five years 45.8%; for six years 50.7%; for seven years 54.4%; for eight years 56.8%.

* Highest percentage of shipment to clinker in this column.

† Lowest percentage of shipment to clinker in this column.

2002

F.T.C. EXHIBIT No. 2895b

VIRGINIA, TENNESSEE, ALABAMA, GEORGIA, FLORIDA AND LOUISIANA

	District Percent	1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
		88.7	87.6	78.2	71.0	59.6	53.7	50.4	23.4	23.2	56.5
Lone Star	320	—	†62.3	79.1	65.8	61.7	72.1	81.0	*55.1	45.5	#65.2
" "	321-322	85.7	94.3	79.7	61.4	51.1	48.1	52.8	14.8	†12.5	54.1
" "	323	—	—	72.2	90.6	92.3	*88.5	79.0	31.7	27.9	#63.4
Penn Dixie	324-326	†81.9	84.9	69.7	64.7	53.6	43.2	38.6	19.9	12.6	51.7
Lehigh	327-328	96.6	*97.6	93.2	81.2	61.5	63.0	56.3	25.6	27.4	66.8
U — A	329	*96.9	91.4	74.6	75.1	52.4	43.2	24.6	†12.8	22.1	54.0
Signal Mt.	330	82.0	90.8	70.1	55.5	52.5	44.5	51.7	18.4	23.6	54.4
Florida	331	—	—	28.7	71.8	50.5	58.5	43.4	24.5	28.7	#43.4
Alpha	332	—	—	86.6	75.6	63.1	43.9	60.0	22.6	28.8	#53.3
National	333	93.0	79.7	90.4	74.8	66.4	49.4	51.2	16.3	19.7	57.6
Volunteer	334	—	—	—	87.7	85.1	86.7	*83.2	39.7	33.6	#67.4
Hermitage	335	*94.3	87.4	*93.6	*96.3	*94.4	64.8	35.8	37.0	27.7	*69.7
Cumberland	336	—	—	†20.9	65.1	59.6	59.1	25.9	17.1	21.0	#39.6
S. States	337	84.8	83.5	89.3	90.5	62.9	52.7	66.8	22.8	*35.9	65.4
Georgia	338	87.3	72.9	72.0	†27.8	†15.8	†17.4	†19.3	13.3	18.3	†38.0

District Percent—Average for six years 46.4%; for seven years 50.3%; for eight years 53.8%.

* Highest percentage of shipment to clinker in this column.

† Lowest percentage of shipment to clinker in this column.

2004

F.T.C. Exhibit No. 2895b

MICHIGAN

	District	1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	Percent	68.2	73.5	82.0	85.7	79.8	63.1	41.8	28.5	20.8	59.7
Huron	280	*83.3	*83.4	88.9	*98.9	*93.4	81.7	54.4	37.7	24.2	*71.0
Peerless	281-282	49.0	77.5	*95.1	90.1	73.5	43.4	25.3	16.4	†12.3	52.7
Petoskey	283	60.8	79.0	84.8	92.2	83.2	64.4	59.0	37.3	28.5	64.5
Aetna	284-285	80.3	73.2	79.7	77.5	83.0	62.5	*59.3	*50.7	*35.5	65.8
Consolidated	286	76.9	64.2	71.8	77.4	73.9	66.2	38.4	33.3	26.2	58.3
Medusa	287	68.8	53.9	73.3	71.5	69.6	41.4	33.5	† 3.8	0	46.2
Ford	288	62.9	74.1	77.5	74.7	83.0	*86.5	*	*	*	
	289	52.3	79.0	78.8	78.5	71.6	62.4	*	*	*	
Wolverine	290	†44.8	†47.7	†48.7	†61.9	60.6	42.6	27.9	21.8	18.9	†41.6
Alpha	291	71.5	53.4	60.8	63.4	†48.1	†38.6	†18.4	.0	0	39.4

WISCONSIN, ILLINOIS, INDIANA AND KENTUCKY

	District	1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	Percent	85.2	84.9	86.2	84.7	74.4	67.6	52.4	37.1	26.9	65.3
U. A.	300	*89.5	92.1	*90.8	89.7	72.5	59.9	38.3	13.2	†13.4	62.0
Marquette	301	88.1	*96.8	88.9	*95.1	81.9	*91.7	*71.4	*84.5	*61.1	*82.7
Lehigh	302-303	87.3	82.2	86.4	80.2	59.5	†48.1	50.4	26.0	20.5	60.3
Medusa	304-305	86.9	86.9	88.5	83.1	82.9	70.1	58.9	33.2	21.0	66.7
L. Star	306	80.3	64.9	74.1	64.5	78.8	82.3	64.9	29.6	15.6	†55.5
Louisville	307	72.2	75.5	73.8	80.0	83.1	65.1	58.0	58.0	47.0	68.0
Alpha	308	79.4	79.2	87.0	91.6	*83.7	69.6	42.7	67.0	27.6	69.5
Kosmos	309	†66.7	56.5	80.6	78.3	66.3	77.0	*71.4	50.5	47.8	66.0
Wabash	310	72.1	†52.9	†55.3	†53.5	†57.5	54.3	†23.4	†10.4	0	42.2

* Shipment figures not available now; will supply them later if they can be procured.

† Lowest percentage of shipment to clinker in this column.

2003

F.T.C. Exhibit No. 2895c

Eastern Missouri, Iowa, Minnesota and South Dakota

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District Percent	78.5	72.6	72.4	75.2	69.3	69.9	49.3	40.7	29.2	60.8
U -- A	350	88.2	65.5	61.1	64.7	63.2	†56.7	†21.0	†11.5	†18.1	†50.0
N Western S.	351-352	67.2	61.2	71.3	74.6	†57.7	68.6	58.8	38.6	24.0	57.9
Missouri	353-354	95.0	78.0	72.8	90.3	67.5	62.9	50.4	31.5	25.6	58.7
U — A	355	79.1	82.4	83.6	74.7	68.3	85.8	52.9	47.8	19.8	66.0
Lehigh	356	*97.5	82.5	78.2	70.6	70.0	74.8	54.7	40.4	27.4	64.9
Alpha	357	75.6	62.0	69.6	63.0	61.4	63.9	43.5	62.4	33.7	58.9
Marquette	358	68.5	*101.7	89.0	*102.3	*91.6	*96.7	71.0	*79.1	*83.0	*87.1
Hawkeye	359	75.9	74.8	79.3	84.0	81.2	75.2	57.9	42.4	26.5	66.1
Dewey	360	—	—	*90.5	76.6	91.0	72.6	50.9	56.9	36.4	#63.3
P. Dixie	361	58.4	62.7	59.0	†58.9	64.0	64.4	53.5	44.5	24.9	54.0
S. Dakota	362	†48.7	†59.2	†54.2	73.5	65.7	66.9	*72.4	46.9	29.7	57.4

District Percent—Average for seven years 57.4%.

* Highest percentage of shipment to clinker in this column.

† Lowest percentage of shipment to clinker in this column.

2005

Western Missouri, Nebraska, Kansas, Oklahoma and Arkansas

	District	1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	Percent	79.7	74.7	74.4	77.8	76.1	69.8	54.3	31.3	27.6	61.1
Oklahoma	370	75.6	77.1	*95.4	*95.1	89.6	83.1	55.6	30.9	28.3	*69.3
Nebraska	371	81.6	†61.5	73.5	73.3	78.4	77.8	72.2	27.2	31.8	63.0
Consolidated	372-373	88.5	76.1	67.0	62.8	60.5	58.0	†20.2	†17.0	†17.1	51.7
Ash Grove	374	88.7	*86.5	85.5	85.0	82.9	76.9	49.6	24.5	24.4	66.1
" "	375	—	—	—	—	73.1	*87.0	*87.3	40.8	34.6	#63.8
Dewey	376	84.0	84.7	84.3	85.6	89.8	79.5	49.9	26.2	34.1	67.3
Monarch	377	72.2	65.2	63.1	82.5	81.2	68.7	58.1	21.9	28.9	59.9
U — A	378	*94.5	74.9	76.5	92.5	*92.0	63.9	33.1	21.0	26.4	62.1
Lehigh	379	†68.4	62.2	66.5	57.5	58.8	†44.7	61.2	17.6	18.0	†50.5
Lone Star	380	69.3	77.0	77.4	75.6	69.3	52.4	72.7	45.6	24.2	61.7
Missouri	381	72.5	73.2	†34.9	†52.9	66.8	67.9	40.4	*67.4	30.6	55.7
Arkansas	382	—	—	—	—	†24.3	77.3	79.7	54.6	*40.6	#57.9

District Percent—Average for five years 51.2%.
* Highest percentage of shipment to clinker in this column.
† Lowest percentage of shipment to clinker in this column.

2006

F.T.C. Exhibit No. 2895c

Texas

	District	1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	Percent	84.5	87.7	87.0	90.2	83.4	69.9	62.3	37.4	30.4	66.4
Trinity	390-392	†70.2	89.7	†78.9	*95.7	83.2	*80.5	70.4	29.8	†20.8	66.9
Lone Star	393-394	*98.0	*92.3	*96.1	86.4	*92.7	66.3	71.8	50.2	35.4	*75.1
S. Western	395	82.3	†70.2	81.0	90.8	80.4	60.4	†35.0	†24.1	22.9	†58.6
Republic	396	—	—	—	—	†61.8	68.1	42.7	28.1	26.8	#42.9
U-Atlas	397	—	—	—	—	87.4	75.5	*81.6	*57.7	*48.0	#67.2
San Antonio	398	78.8	90.0	89.4	†84.8	68.2	†55.0	*	*	42.9	

District Percentage—Average for five years 55.8%.
* Shipment figures not available now; will supply them later if they can be procured.
† Lowest percentage of shipment to clinker in this column.

F.T.C. EXHIBIT No. 2895d

COLORADO, MONTANA, UTAH, WYOMING AND IDAHO

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District										
	Percent	55.0	58.8	53.8	51.0	49.3	38.1	32.5	19.5	22.3	40.1
	#410-413)										
	#415-416)	54.4	58.9	*55.7	†50.9	46.8	†34.9	29.3	25.6	†21.0	40.6
Monolith	414	—	—	—	—	*80.4	50.7	*	*	46.3	
P. C. of Utah	417	*64.6	*59.9	†42.0	*51.7	63.6	*	*	*	*53.9	
Idaho	418	—	—	—	—	†36.0	51.9	*	*	23.9	
Utah-Idaho	419	†51.9	†56.9	42.7	51.5	50.2	*52.1	*	*	*	

CALIFORNIA

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District										
	Percent	88.8	82.9	77.0	75.4	68.7	54.4	40.3	30.8	36.6	60.8
Pacific	440-442	87.2	79.8	65.4	72.5	62.4	46.8	*	*	†24.8	
Santa Cruz	443	80.4	79.9	80.4	73.5	72.5	61.3	*	*	47.8	
Calaveras	444	—	65.6	71.8	*90.6	81.5	44.3	*	*	30.9	
Cowell	445	†73.3	†59.8	52.8	†55.0	†50.4	45.5	*	*	25.6	
Yosemite	446	—	—	†42.9	75.7	*105.1	68.2	*	*	34.0	
Riverside	460-461	91.3	89.6	74.7	62.6	55.2	†43.1	*	*	27.0	
California	462	97.6	85.4	88.6	86.7	76.7	61.0	*	*	37.8	
S. Western	463	*100.2	80.6	85.4	89.4	72.6	*71.1	*	*	51.6	
Monolith	464	82.9	*94.6	*99.6	86.4	84.6	70.2	*	*	*70.6	

* Shipment figures not available now; will supply them later if they can be procured.

† Lowest percentage of shipment to clinker in this column.

410 — Colorado
411 — Three Forks
412 — U. States Portland
413 — Colorado
415 — Union Portland
416 — Three Forks

F.T.C. EXHIBIT No. 2895d

OREGON AND WASHINGTON

		1925	1926	1927	1928	1929	1930	1931	1932	1933	Average for Nine Years
	District Percent	83.8	69.4	76.0	84.0	54.6	61.8	43.3	25.2	14.4	53.8
Oregon	480-481	89.9	68.5	†61.9	†54.5	55.2	62.5	*	*	17.1	
Beaver	482	70.4	*73.1	74.9	62.6	55.1	49.6	*	*	15.0	
Superior	#490, 492	87.1	69.1	*85.1	*114.5	58.5	*70.0	*	*	†12.5	
Olympic	491	*97.6	71.4	74.2	83.6	41.8	69.0	*	*	15.2	
N. Western	493	—	—	—	79.1	62.9	49.8	*	*	15.2	
International	494	†54.4	68.0	81.2	69.0	†41.4	†33.7	*	*	13.3	
Lehigh	495	73.4	†66.1	71.6	79.8	*67.0	49.8	*	*	*20.5	

2008

* Shipment figures not available now; will supply them later if they can be procured.

† Lowest percentage of shipment to clinker in this column.

— 492 Pacific.

CLINKER CAPACITY: Estimated on the three highest consecutive months' production.

DISTRICT PERCENT: Total shipments of all the plants in each district for each year divided by the total capacity of that year; for example, take Districts 1 and 2 for 1925 capacity 54,070,000/48,365,000 shipments.
89.4%

COMPANY PERCENT: Total shipments during each year divided by capacity of that year; for example, take Company 200-207 for 1925, capacity 9,227,000/8,275,000 shipments.
89.7%

On April 3, 1939 Mallory sent to counsel for the Commission a tabulation of clinker production, cement production and shipments during 1936, 1937 and 1938 for each company grouped in districts.[11] At the request of Commission's counsel, Mallory broke this down into plants.[12] At the request of counsel Mallory also produced the estimated clinker capacity of these plants for the years 1936, 1937 and 1938.[13] The estimate is the same for each year. Transmitting this tabulation of estimates, Mallory wrote under date of April 19, 1939:

> "As I have already explained to you, the cement companies do not furnish me with capacity figures, either actual or estimated, but as a matter of personal interest to myself as a statistician, I have made and keep a record of my own estimates of clinker capacity. The enclosed tabulation is made up from this record. My estimate of clinker capacity is formulated by taking the three highest consecutive months of clinker production of a given plant, dividing that total by the number of days in the three months so taken, to get the daily average, and then multiplying the daily average by 365 to get the estimated annual capacity."[14]

The tabulation of cement and clinker production in each of these years (Com. Ex. 3203) shows no fixed relation to Mallory's estimates of capacity (Com. Ex. 3205). It does show, however, that through the years 1936, 1937 and 1938 the variation in production in any plant between any two years amounts to a considerable percentage of the production in one of those years. The variation is not uniform as between the companies except so far as it shows that 1937 was generally a better year for the sale of cement than 1936 or 1938.

The Findings,[15] state: "Figures for these Districts for the years 1936, 1937, and 1938 prepared by Mr. Mallory

[11] Com. Ex. 3045.

[12] Com. Ex. 3203.

[13] Com. Ex. 3205.

[14] Com. Ex. 3204.

[15] Par. 15(h).

and rearranged and translated into terms of percentages, show the extent to which shipments conformed to the 62 percent and 38 percent pattern and the relationship of shipments to clinker capacity."[15]

The 62–38% pattern referred to was that involved in Brobston's plan of allocation[16] based upon statistics of shipments in the years prior to 1934 between the chains and the single plant companies operating in Districts 1 and 2. The Findings then set forth a table, as follows:[17]

[Italicized part quoted in Fdgs. Par. Fifteen (h)]

Districts 1 and 2

	Percent of Total Shipments			*Percent of Shipments to Capacity**		
	1936	*1937*	*1938*	*1936*	*1937*	*1938*
Total, chain mills	63.42	63.93	62.58	33.28	37.46	34.03
Total, individual mills	36.58	36.07	37.42	37.90	38.82	37.37
Lehigh	16.15	16.72	15.58	29.74	42.41	36.68
Universal	12.31	13.03	12.75	31.19	34.30	31.14
Penn-Dixie	7.77	7.55	7.82	33.05	33.36	32.06
Alpha	6.78	5.78	7.31	30.43	26.96	31.64
Lone Star	6.46	6.99	6.16	42.02	47.18	38.59
North American	6.49	6.78	6.25	39.41	42.73	36.54
Lawrence	5.61	5.21	4.98	35.75	34.51	30.57
Medusa	1.85	1.86	1.72	53.01	55.40	47.55
Vulcanite	2.14	2.35	2.33	22.41	25.61	23.58
Edison	4.53	3.98	3.68	47.46	43.34	37.23
Coplay	2.82	2.84	2.96	31.03	32.43	31.34
Nazareth	3.22	3.14	3.40	39.08	39.61	39.86
Hercules	3.28	3.09	2.95	37.79	37.05	32.75
Giant	2.37	2.51	1.86	28.48	31.33	21.52
Allentown	4.69	4.88	4.47	48.70	52.62	44.75
Keystone	4.22	4.08	4.78	49.65	49.88	54.18
Glens Falls	1.83	2.14	3.26	32.37	39.24	55.43
Federal	1.63	1.74	1.66	33.01	36.63	32.45
Whitehall	5.85	5.31	6.06	71.95	67.80	71.85

(Com. Ex. 3203 A; 3205 A)

* Includes estimated capacity of National Portland Cement Company. Shipments of this company not available.

[16] *Infra*, Part XII, Sec. C 3, pp. 2141-42.

[17] Par. 15(h).

Below is a table of the shipments in thousands of barrels of each of the companies from plants in Districts 1 and 2 in 1936, 1937, and 1938 as they appear in Mallory's table.[18] The highest annual shipment for each company is starred (*) and the lowest crossed (†) and in the right hand column we show the percentage of increase of the high over the low. The table discloses that the highs and lows did not occur in the same year for all the companies as they would if there existed any agreed plan for the control of production; nor do the variations of the percentages of the high year over the low ranging from 4% to 71.2% indicate conformity to any pattern for sharing the market.

	1936	1937	1938	% of Increase High year over Low year
Lehigh	4,072	*4,377	†3,785	15.6
Universal Atlas	3,102	*3,411	†3,097	10.1
Penn Dixie	1,959	*1,977	†1,900	4.0
Alpha	1,708	†1,513	*1,776	17.4
Lone Star	1,629	*1,829	†1,496	22.2
North American	1,637	*1,775	†1,518	16.9
Lawrence	*1,414	1,365	†1,209	16.9
Vulcanite	† 539	* 616	567	14.2
Edison	*1,141	1,042	† 895	27.5
Coplay	† 711	* 743	718	4.5
Nazareth	† 811	822	* 827	2.0
Hercules	* 826	810	† 716	15.4
Giant	598	* 658	† 452	45.6
Allentown	1,182	*1,277	†1,086	17.6
Keystone	†1,064	1,069	*1,161	9.1
Glens Falls	† 462	560	* 791	71.2
Federal	411	* 456	† 404	12.9
Medusa	466	* 487	† 418	16.5
Whitehall	*1,475	†1,390	1,473	6.1
Total	25,207	*26,177	†24,289	7.7

* Highest annual shipment of this company.

† Lowest annual shipment of this company.

[18] Com. Ex. 3203 A.

D. Committee Activities.

The record refers to twenty-two committees and these are shown on Chart XI-A on page 1876. The work of six of them is covered in this section. The evidence as to the sixteen other committees is digested at the following pages:

Organizing Committee	Part X A 2.a p. 1802
Chicago Advisory Committee	Part X A 2 b p. 1804
Kansas City Advisory Committee	Part X A 2 b p. 1805
Reorganization Committee	Part X A 3 b p. 1814
Control Committee	Part XII A p. 2100
Washington Contact Committee	Part XII A p. 2100
Committee on Plan for Sharing Available Business:	
Coffin Committee	Part XII C 3 p. 2129
Storey Committee	Part XII C 3 p. 2132
Brobston Committee	Part XII C 3 p. 2140
Committee on New Plants	Part XII C 4 p. 2153
Committee on Cost Accounting	Part XII C 2 p. 2125
Committee on Forms of Contracts	Part XV p. 2621
Trade Practice Committee	Part III I and X B:3 pp. 1850
Committee on Reconciliation of Statistics	Part XI C 8 p. 1958
Committee on Future Activities	Part X A 3 c p. 1822

1. Executive

The Articles of Association as revised in June, 1933 provided for the appointment of an Executive Committee.[1] The committee held two meetings in July, 1933 in which it devoted itself to the consideration of questions arising out of the preparation of a code for the cement industry under NRA and other matters, principally labor relations, current

[1] Resp. Ex. 2170 E.

at that moment. The minutes of these meetings are the only minutes of the Executive Committee appearing in the record.[2]

Lundborg, Secretary of The Institute, making a written report to Reiter in June, 1935, on the committees then in existence stated:

> "There has been no meeting of this (Executive) Committee since 1933 * * *."[3]

Scott, President of Keystone, testified that he was a member of the committee from 1935 to 1937 but that he could recall attending only two meetings.[4] The meetings he did attend were perfunctory and he could remember only a discussion as to the remuneration for some employees.[5]

2. Labor

In March, 1934, the Trustees approved the appointment of a Committee on Labor

> "* * * to study all labor matters and make such recommendations to the Board, from time to time, as it considers desirable, concerning labor matters and labor policy of the Industry."[1]

The Code Authority referred labor matters to this committee, seeking its advice before taking action and the committee worked with the Bureau of Labor Statistics in the Department of Labor in perfecting a form for soliciting information on wages, hours and earnings of labor in the cement industry and urged members of the industry to submit the data requested by the Bureau. It also con-

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[2] Com. Ex. 634 A-E: Executive Committee's meeting 7/6/33.
Com. Ex. 634 F-M: Executive Committee's meeting 7/13/33.

[3] Com. Ex. 593 C.

[4] (R) Tr. 27556.

[5] (R) Tr. 27606.

[1] Com. Ex. 619 C: Trustees' minutes 3/15/34.

cerned itself to see whether or not provisions of the Code relating to labor were being complied with. This committee ceased to function about the middle or end of 1935.[2]

3. Bag Tax

A Bag Tax Committee functioned between March and July 1934 and between May 1936 and July 1937. The purpose of this committee was to convince the Department of Agriculture that the processing taxes on cotton bags, and subsequently on paper bags competing with cotton bags, were not properly applicable to the cement industry because the cotton bags were not sold by the industry but merely leased. The committee succeeded in its efforts and under advice of counsel informed members of the industry as to the basis of claims for refunds on taxes paid.[1]

4. Tariff

At their meeting on March 15, 1934 the Trustees appointed a Tariff Committee.[1] Mr. F. M. Coogan, of Alpha, was appointed chairman.[2]

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[2] Reiter, General Manager, Institute (C) Tr. 16735, 16897-99. Com. Ex. 624 D; Trustees' minutes 12/9/35.

[1] Coogan, Vice President, Alpha (R) Tr. 24003-04.
Reiter, *supra*, Tr. 4533, 16739-40, 16883-84.
Resp. Ex. 1808: Lundborg to G. E. Warren 12/11/33.
Resp. Ex. 1809: Notice to members re tax on paper sacks 12/26/33.
Resp. Ex. 1810: Reiter, General Manager, to members re refund of AAA taxes 5/6/36, enclosing opinion of counsel.
Resp. Ex. 1813: McFadden to Lundborg 1/8/34 transmitting brief on behalf of the Institute re AAA tax on paper bags.
Resp. Ex. 1814: Cement Institute to Secretary of Agriculture 1/6/34.

[1] Com. Ex. 629 B.

[2] Resp. Ex. 741: Lundborg to members 4/4/34. The letter lists the other members as C. L. Hogan, of International, J. S. Young, of Lehigh, A. O. Stark, of Universal Atlas, J. H. Ackerman, of Lawrence, J. A. Keller, of Pacific, and G. H. Elliott, of Whitehall.

Coogan testified that the purpose of the committee was to follow all matters pertaining to the duties on, and importation of, foreign cements, with particular reference, at the time of his appointment, to presentation of the case of the cement industry with respect to reciprocal tariff agreements.[3] This committee prepared a 19 page draft protesting on behalf of the Cement Industry to the Committee for Reciprocal Information.[4] Fifteen months after its appointment Lundborg, Secretary of the Institute, reported to Reiter that the committee was engaged in the preparation of a brief in protest against the then proposed Belgium and other trade agreements.[5] Reiter testified that the Committee was revived in 1936 or 1937 to investigate importation of foreign cement and protest further "elimination" of the tariff on cement;[6] and that it disseminated information showing that under the influence of reciprocal trade treaties imports of cement in 1936 were approximately six times those of 1934.[7] Coogan testified that he did not believe that the tariff committee had ever been dissolved although it had been inactive for sometime but was active again at about the time he gave his testimony.[8]

5. Local Materials

The minutes of the Board of Trustees at their meeting in Chicago on January 11, 1934 state:

> "Districts Nos. 1 and 2 called the attention of the Board to the serious condition resulting from certain States requiring, either by regulation or dictation, that cement for highways and other public works in the State must come from cement plants within the State, and proposed that steps be taken

[3] (R) Tr. 23973-74.
[4] Com. Ex. 885-2 A.
[5] Com. Ex. 593 A.
[6] (C) Tr. 16739.
[7] (C) Tr. 16902.
[8] (R) Tr. 23996.

by The Cement Institute, representative of the industry as a whole, either by the appointment of a committee or otherwise, to prevail on the different States to cancel such requirements and permit the use of cement from any cement mill able to sell in the State.

Blaine S. Smith called attention to the regulations of PWA in respect to the use of local materials and the interpretations thereof issued October 23, 1933, first as to Federal projects and second as to State projects, requiring as to the latter that cement must come from plants within the State. Mr. Smith thought that the PWA's regulation should be the first point of attack, and presented resolution, which was duly seconded, that the President of The Institute appoint a committee to secure from PWA regulations or interpretations, as to local materials, which would be satisfactory and not restrict the source of cement supply to the mills closest to the work or within the State where the work is located. L. T. Sunderland presented an amendment, which was duly seconded, providing that such committee should also undertake to get the different States to abrogate any requirements of their own for the use of materials from sources within the State only.

The amendment and the motion were unanimously passed, and the President, pursuant thereto, appointed the following committee:

Blaine S. Smith, Chairman
F. M. Coogan
H. B. Robeson
Frank H. Smith
F. L. Stone"[1]

Examined as to the nature and activities of this Committee, Reiter testified:

"Q. Were there a considerable number of States that had policies giving preference to local mills? A. Many of them had the idea from time to time and exercised it to a greater or less degree.

Q. Was the work of the local materials commit-

[1] Com. Ex. 617 C-D.

tee devoted to showing State officials that they could buy just as advantageously from out of the State mills as from those within the State? A. I think it was more directed to the fact, Mr. Wooden, that if State barriers or tariff walls were built around the State——

Q. Not tariff barriers? A. Well, I mean barriers on the State lines—that any preference which they showed for materials within the State would react unfavorably toward that State in another direction.

Q. They had to be able to show they could buy just as advantageously from out of the State mills? A. I do not think they would make the effort to encourage them to buy outside of the State unless the price was equal to or lower than that which they would have to pay within the State.

Q. And there would have been not much chance of success if the mills within the State had made a lower price than the ones coming from without the State? A. No, sir, there would not be much chance of success.'"[2]

And again:

"Q. What were the circumstances surrounding the appointment of that committee, if you know? A. The P.W.A., as well as many state regulations, provided a preference for cement manufactured within the state for use on projects within that state and the Local Materials Committee was appointed to deal with that situation.

Q. How did these regulations affect the producers of cement? A. Well, it worked a hardship on a number of producers, particularly those who were located near the state line, but outside of the state where the project was to be constructed, and who could, in many cases, serve the project with less haul or more satisfactory delivery than plants located within the state.

Q. Were any of its efforts in connection with P.W.A., Mr. Reiter? A. The Local Materials Committee did make efforts to have the rule of the P.W.A. rescinded and those efforts were successful

[2] (C) Tr. 4521-22.

so that local cement was not any longer preferred for non-Federal projects within the state.

Q. Can you tell us whether the individual states had restrictions comparable to P.W.A.? A. Some 30 states had such restrictions.

Q. And did this committee of the Institute deal with these individual state restrictions? A. Shortly after its formation the local materials committee recommended that its efforts be confined to Federal projects and Federal regulations of this kind and that the local efforts should be put in the hands of local committees, and local committees were appointed for that purpose.

Q. When you say they were appointed, were they recognized in any way by the officials? A. They were recognized by the officials in many states and in some cases were successful in having these local preferences or local requirements removed.

Q. Mr. Reiter, what happened with respect to this local materials committee? Is it still in effect? A. No, it is not now in existence, and it completed its work in 1935."[3]

At a meeting of the Trustees on May 10, 1934, Blaine Smith, Chairman of the Committee, stated that "Committees of Two had been organized for several of the States having restrictive measures and that the work was under way to correct, if possible, the conditions existing within these States."[4]

On August 15, 1934, the minutes of the trustees report:

"Mr. Smith stated that a Committee of Two was actively at work in connection with the use of local materials in the States of Pennsylvania, New York and Virginia. No report has been received in connection with the work of the Committee for Ohio and West Virginia. The matter of local materials appeared to be satisfactorily adjusted in New Jersey and, in Maine, the situation was not acute.

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[3] (C) Tr. 16887-89.

[4] Com. Ex. 620 B: Minutes trustee's meeting 5/10/34.

Mr. Blaine S. Smith requested to know the desire of other Districts to have this work done and also requested that the District Trustees obtain definite instructions from their members and proceed with the appointment of the Committee of Two for the respective States."[5]

Robeson, Vice President of Nazareth, was a member of the committee in the State of Pennsylvania. Reporting to Smith on August 29, 1934 as to the success of the committee's endeavors, Robeson referred to a meeting in Harrisburg on February 27 with Mr. Samuel Lewis, Secretary of Highways, Mr. Samuel Eccles, Chief Engineer of the Highway Department, Mr. F. H. Mason, Director of Purchases, Department of Property and Supplies, and H. S. Mattimore of the State Testing Laboratory. The letter states:

"Mr. Mason presented to Mr. Lewis the petition which we had filed, which had been signed by all manufacturers with plants located in the State. Mr. Lewis then gave us an opportunity to present our ideas, and stated that he personally was in favor of free and open competition between States; that he recently had been requested by manufacturers in other lines located within the State to give them preference over manufacturers coming in from the outside, and he had refused to do so.

Mr. Eccles also stated he had some correspondence with the Highway Commissioners of the State of New York in connection with other materials, and he himself also fought for the principle of free interchange of products.

Mr. Mason being of the same frame of mind, this then left us with the objections of Mr. Mattimore, who objected to the expense of the Testing Laboratory having to send inspectors to distant points outside of the State. Mr. Lewis over-ruled this objection on the ground that the principle was so important, the consideration of expense should be secondary—especially at a time such as the present

[5] Com. Ex. 621 B.

when it was the desire of all people interested in the country's welfare to create employment."[6]

The letter continues, describing an arrangement for the inspection of cement at plants outside the State in bins specially reserved for cement to be sold to the State and the probable acceptance of the arrangement by the Governor who "had previously expressed himself as being in favor of the idea". The letter then continues:

> "There is only one qualification which they probably will have to make when they serve formal notice on us through The Institute: that is, the Constitution of the State of Pennsylvania definitely states that its citizens shall have equal opportunity in all other States in the Union, and failure on the part of any State to grant equal opportunity to Pennsylvania citizens shall cause the State to invoke a shut-out rule against the products of the offending State.
>
> This, after all, fits in with what we are trying to accomplish and should not offer us any difficulty. I am inclined to think we should hold our general notice to the industry until such time as we have the formal notice from the State, which they insisted they wanted to do."[7]

Mason, Director of Purchases, brought up the question of the award of a contract by a drawing when it chanced to go to a distant manufacturer who was not able to service the job properly. The letter continued:

> "He requested that our industry give some consideration to the question of manufacturers bidding at points far removed from their plants, more especially when these points are adjacent to other plants. What he has in mind is that he is bound as the Purchasing Officer to award the business to the lowest bidder, and in event of tie bids, to award by lot; if a far-away manufacturer should be successful by this method, he is obligated to give him the

[6] Com. Ex. 800-2 U.

[7] Com. Ex. 800 WW.

business regardless of the service or running time involved.

We told Mr. Mason that this was a question we could not properly put to the members of our industry, as our industry has always fought for the principle of the right of free and open competition at all points. Mr. Mason then stated that while his bidding regulations were such that any manufacturer who failed to bid on three successive proposals was removed from the mailing list, if a manufacturer did not want to quote because of the low net he would receive, or the fact that this point might be better serviced from a nearby mill, if his company would file the bid in the regular way, marking it 'No Bid', the company would maintain its place on the mailing list; in this way, his drawing would be limited to the manufacturers who would be best able to serve the particular proposal, and who in turn would receive the most favorable net.

We told Mr. Mason that while our Committee could not under any circumstances request any manufacturer to refrain from quoting on any proposal, he had been so courteous and cooperative with us on our problem that we would pass his request back to the industry for their individual consideration.'"[8]

At the meeting of Districts 1 and 2 on October 26, 1934, Ackerman, Vice President of Lawrence, informed the meeting that a letter had been dispatched to the Department of Purchases and Supplies in New York, which he understood would be "sent on to the Governor with recommendation that the executive order with respect to local materials be withdrawn". The minutes of this meeting then record:

"Mr. Blaine S. Smith then stated that nothing further would be done in Maryland for the time being and that the State of Pennsylvania is an open market with respect to the purchase of cement.

[8] Com. Ex. 800 WW-XX.

Maine—no restrictive measures are in effect.

New Jersey—understands that possibly additional work may be necessary in this State.

West Virginia—has no report, but understands that the Committee of Two saw the Governor about a fortnight ago.

Virginia—The State Committee reported that they had interviewed the Governor and other officials and that there is a State law requiring preference be given to Virginia mills.

Mr. Robeson reported that the local office of the F.E.R.A., in New York will not furnish bid blanks to any company not located in New York State.

Mr. Blaine S. Smith stated that there are no official regulations or instructions at Washington to this effect and where such restrictive conditions exist, they are local regulations.

Mr. Ackerman stated that until such time as New York State withdraws its restrictive regulations, the local F.E.R.A. feel that theirs should remain in effect."[9]

At the meeting of Districts 1 and 2 on February 13, 1935, Smith reported that the "State Committee of Two for New York reported encouraging progress in their interview with the Governor."[10]

The minutes of the trustees' meeting on February 14, 1935, record:

"For the Local Materials Committee, Mr. Blaine S. Smith briefly discussed the situation in different States and stated that he was inclined to recommend to the members of his Committee that the Committee be discharged and the work turned over to the District Trustees, believing it to be more effectively handled in that way. The recomendation of the Committee will be reported at the next meeting of the Board."[11]

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[9] Com. Ex. 637 S-T: District minutes 10/26/34.

[10] Com. Ex. 637 X.

[11] Com. Ex. 622 C: Trustees' minutes 2/14/35.

On June 19, 1935, Lundborg, Secretary of the Institute, forwarded to Reiter a summary of the activities of the then existing committees of the Institute in which he reported for the local materials committee:

> "This Committee has mailed considerable material to the members pointing out the fallacy of local State restrictions and has appointed State Committees of Two to operate in States having local restrictions, in an attempt to remove the barriers against the use of cement coming from other States.
>
> At a meeting of the Board in May, the work of the Local State Committees was placed under the direction of the District Trustees and the General Local Committee is confining its work to such restrictions which are nationwide in their character.
>
> Attached you will find letter of May 24th to the District Trustees in connection with this matter; as well as a list showing the State Local Materials Committees of Two."[12]

Smith prepared a draft report of the activities of the committee and forwarded it to Reiter on July 31, 1935. The covering letter stated that it was prepared for the annual meeting in Chicago in 1934 but it does not appear whether it was ever presented. In the covering letter Smith wrote:

> "During the ensuing months it became evident that members in some states were not giving wholehearted support to the Local Materials Committees for these states, and that furthermore the situation as it affected a given State was connected with a comparable situation in a nearby or adjoining State, requiring coordination between the Committees for two or more States.
>
> It was the opinion of the General Committee that it could not handle effectively these situations by correspondence from a distance, and it was therefore proposed at a meeting of the Board of the

[12] Com. Ex. 593 B.

Institute several months ago that the work of the State Local Materials Committee in respect to *State* restrictions be turned over to the District Trustees to be handled by them. This action was approved by the Board. The General Committee, it was understood, would continue to function in respect to general questions and in respect to any *Federal* restrictive regulations relating to local materials."[18]

The draft report enclosed to Reiter stated *inter alia*:

"After nearly a year's effort, we finally succeeded in May of this year in getting the PWA at Washington to remove all restrictions against the use of cement from outside a given state when for use in non-federal projects within such state. There are now no Federal restrictions in effect.

As to restrictions exercised by the states themselves,—the work is now under way on a broad front. There are thirty states which have been reported as exercising some form of restriction on one or more classes of state construction work against cement from outside such states. These restrictions take different forms: in a few cases they are statutory; in others they are the result of executive orders or state regulations; in still others the restriction takes the form of unofficial requests or compulsion. These thirty states are the following:

Alabama	Kentucky	Oklahoma
Arkansas	Maine	Oregon
California	Maryland	Pennsylvania
Colorado	Michigan	South Dakota
Florida	Missouri	Tennessee
Georgia	Montana	Virginia
Illinois	Nebraska	West Virginia
Iowa	New Jersey	Texas
Indiana	New York	Wisconsin
Kansas	Ohio	Wyoming

[18] Com. Ex. 1036 A.

As it is quite out of the question for a single committee like the General Local Materials Committee to effectively handle these situations, which differ more or less as between the various states, it was decided to appoint Local State Committees. These committees, consisting of one member representing mills within the state and one member representing mills outside of the state, are familiar with the local conditions and in many instances are acquainted with the state officials and therefore are best informed as to the most effective methods to employ to get the restrictions eliminated.

Accordingly, State Local Materials Committees have been appointed in all the states before mentioned except California, Iowa, Michigan, Missouri, Oregon, South Dakota, and Texas. In some of them the appointment of committees has been delayed awaiting the adoption by members in the different districts of appropriate resolutions endorsing the movement to eliminate state line restrictions and pledging support.

* * *

This Committee desires again to impress on the members of the Industry the fact that the work of the State Committees will not be fully resultful unless their efforts are supported wholeheartedly, not only by member company executives, but also by the rank and file of the personnel of the sales and operating departments. The New York State Committee has asked each company with a plant in that State to back up its work by writing their Sales and Operating Departments' personnel explaining the company's policy and instructing their employees to cooperate fully.

The General Committee is now mailing to all member companies, in serial form, one mailing a week for five weeks, certain material which has been collected showing the unsoundness of the 'buy at home' movement and the fallacy of building economic barriers around individual states.'"[14]

[14] Com. Ex. 1036 B-C, F.

6. Public Relations

In 1933 the Governor of Illinois publicly attacked the Cement Industry and charged the Industry with collusion in making prices. On May 1, 1933, Struckmann, President of Lone Star, sent to Young, President of Lehigh, copies of correspondence with Governor Horner of Illinois and in the letter of transmittal stated:

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

"I also wish to confirm my statement to you over the phone, that I am completely in accord with Mr. Mehren's opinion that the public should be fully informed relative to the allegations made by Governor Horner.

I believe that Mr. Mehren's long experience in publicity work would be extremely helpful in creating a better understanding on the part of the public of the situation which Governor Horner has given wide publicity in a rather unfriendly and unjustified manner."[1]

During the code drafting period while the revision of the proposed Code relating to cement prices was under consideration by the NRA, Young, President of Lehigh, wrote to Curtis, Assistant to General Manager, Portland Cement Association, concerning efforts to explain the basis of prices in the Cement Industry, in which he said:

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

"In an effort to absolve the industry from charges of conspiracy and collusion attempts have been made from time to time to describe the operation of the multiple basing point system. To the lay mind any price formula and especially one that smacks of base prices conjures up visions of Pittsburgh plus and the nefarious practices of the steel barons. Therefore, any academic explanation of the price system in the cement industry which is intended to describe the operation of the basing point system, is likely, regardless of how ably presented, to prove dangerous.

[1] Com. Ex. 829.

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

In addition to the questionable psychology of the academic approach, there is another even more serious objection to the studied treatises on our price system. Several books and pamphlets have already been published on this subject and the statements presented are for the most part convincing. However, what may be a matter of primary instruction to the cement man may be a matter of higher mathematics to the man on the street. The system academically presented is difficult for the layman to comprehend. In applying the so-called price formula the writer must of necessity begin the equation with a sum in dollars and cents per barrel at the mill. The reader's attention is immediately centered upon the importance of what to him is a price at the mill. He sees that, if the actual freight rate is added to this mill price, the result is the delivered price f.o.b. destination. The trick to him is the starting point. In order to arrive at the proper result he naturally is convinced that there must be a price at the mill. The writer, in order to make his point clear, has so accentuated the importance of the mill price in describing the operation of the system that the reader loses all sight of the market price. However, everyone familiar with price practices in the industry must realize that what some writers call a mill price is in reality the last rather than the first figure in the price equation. The truth of the matter is that the price is made at the market and the manufacturer receives at his mill whatever may be the remainder of this price after all deductions. Therefore, if the public is confused about the way prices are arrived at in the cement industry we have only ourselves to blame. After all the reader instinctively wants to look at the picture from the buyer's angle. *The cement industry should encourage the public to view the price as a market price and not as a mill price. Every writer on this subject on the contrary has purposely diverted the attention of the reader to the importance of the basing point in building up the delivered price. Faced continuously with such an explanation the*

public has every reason to believe that the cement industry has developed a very clever and foolproof scheme for price manipulation.

I hope that you will pardon what was intended to be a brief introduction to my reasons for directing criticism against your statement on uniformity. However, it may offer to serve as some justification for my personal belief that the sooner the industry stops talking about base prices and mill prices the sooner will the public understand that the price in reality is made by competitive buyers and sellers in a market and not at some isolated point by prearrangement between friendly manufacturers.

The point I questioned in your statement was the remark that 'the delivered price equals the mill price plus the freight cost from mill to market.' In my opinion this statement is inaccurate and misleading. In the first place there is no such thing as a mill price in the cement industry. In the second place delivered prices are arrived at and result from open competition between buyers and sellers in a consuming market and not at a producing mill.

[Italicised part quoted in Fdgs. Par. Twenty-one (b)]

Over and above this consideration, however, is the fact that the material included in your release is intended to answer certain of Governor Horner's charges and particularly the charge of collusion in refusing to sell f.o.b. mill. Much of your mimeographed statement is devoted to a reprint of my remarks on delivered prices at the public hearing. The argument I tried to advance was that f.o.b. mill prices, if imposed upon the industry, would result in chaos. If the reader is told on the first page of the release that the industry arrives at a delivered price by adding something to a mill price, it strikes me that he is very likely to wonder why we persist in refusing to sell at a price we say we have. Moreover the reader is bound to cast a skeptical eye at the argument presented in the remainder of the release when in your opening remarks you freely admit that the very mill price that we contend will

bring chaos to the industry is not only in existence but in actual use."[1]

To this letter Curtis replied, on October 7, 1933:

[Italicised part quoted in Fdgs. Par. Twenty-one (b)]

"Your point relative to the damaging effect of talking about 'mill price' is admirable and I think we were all very dense in our failure to spot that fallacy sooner. With reference to 'mill price' discarded, one of the chief stumbling blocks in the discussion of uniformity of prices is removed.

It is, of course, the seller's job to make his price understood by the buyers. In the case of small buyers, I hardly think it necessary to undertake a detailed, technical discussion but might rely on a short statement such as the following:

> Cement price at a given point and at a given time are uniform because buyers will not pay more than the market price for cement any more than they will for sugar, wheat, gasoline or any of the other standard commodities they are accustomed to buy at uniform prices.
>
> Therefore, manufacturers who desire to sell cement in a given market, must quote prices as low as the lowest, irrespective of their individual delivered costs in that market. Mills more distant freight-wise are simply compelled to absorb the greater transportation costs.
>
> . . . .

In my opinion the above would not be sufficient to meet the condition in Illinois, where our price system has been violently assailed by a governor who is calling upon the voters of the state to support his position. Over several months we have chosen to remain silent. Even some of our friends have become suspicious of us, and in some cases have withdrawn much needed support.

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[1] Com. Ex. 836-3 S-3 U.

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

Public curiosity has been aroused to an extent where unquestionably, we must satisfy it or expect bitter consequences. Certain editors who should be friendly feel that we are gouging. A prominent citizen who has carried on battles for us in an Illinois city informed our fieldmen only a few days ago that he had helped us because he knew there were asphalt, brick and several other rings, but believed the cement people honest; however, he now knew that the latter were tarred with the same stick so he would have to remain quiet and could help us no further.

In an appropriate manner, we should see to it that incoming and other uninformed public officials are acquainted with this price matter. Isn't it more or less to be expected that a newly elected governor of judicial temperament, lacking in business knowledge but with a political urge suggesting an eye on public expenditures, might be confounded by the riddle of how he can get a dozen bids listing identical quotations at 102 distinctions, except by collusion?

Many employees of the industry honestly believe that there is collusion. Some sales managers have told me so. I know some Association employees think so.

These are some of the reasons I have for believing that there are times and situations where academic discussion of the subject is necessary. Your letter very ably argues for holding such discussion to the minimum. I haven't undertaken to discuss methods of presenting the subject, but for the moment we may assume that appropriate means can be found and agreed upon.

I believe we could build up a simple and effective diagram along the lines of either of the enclosed memos. The one on which I have attempted a diagram gets further from the suggestion of price at the mill. Note I have used 'manufacturer' or 'manufacturing' to avoid reference to mill.

I am sending copies of this letter to Messrs. Conn, B. S. Smith, Rader, Berns and Mehren hoping

for further helpful suggestions. It is also my hope to submit to these gentlemen whatever we may write on this subject for publication."[3]

Berns, the Publicity Manager of Universal Atlas, in responding to the copy of this letter sent to him, wrote to Young on October 4, 1933:

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

"*The point you bring out about starting a price equation with a mill price is well taken and in the future we might well avoid starting such discussions with an assumed mill price.*

On page two of your letter you state that if the public is confused at the way prices are arrived at in the cement industry we have only ourselves to blame. I think this is not only true in this case but true regarding many other misconceptions that the public has about the industry. For example, until the release by the Cement Institute from Washington on September 16 nothing had been sent to the press in Illinois or to any other people regarding our side of the story in Illinois. If the press was not informed it was nobody's fault but the industry's because all that the press had were statements by Governor Horner.

This leads naturally to the statement in the second paragraph on page three of your letter to the effect that the public is accustomed to paying the same price for a standard product to all sellers. Despite this fact, the public is confused when prices are uniform and naturally believes that uniformity can result only from collusion and since there is collusion the prices necessarily must be high. In the case of cement, the only part of the public that is familiar with this is the cement-buying public and this represents less than one per cent of the general public. But when this issue is brought to the general public's attention, as in the case of Illinois highway purchases where the whole state is concerned, the whole public becomes a party to the controversy.

[3] Com. Ex. 730 H-I.

[Italicized part quoted in Fdgs. Par. Twenty-one (b)]

And the balance of the public, namely over 99 per cent, not only is uninformed regarding prices in the cement industry but is misinformed by virtue of statements released accusing the industry of being a trust and of attempting to gouge the public. For this reason it seems important that when the matter becomes one in which the general public is interested, that is when politics is involved, we are at a disadvantage because the general public ordinarily is uniformed or worse still, misinformed. *We scarcely can avoid a discussion of uniform prices because the question has been presented by others to the public.*

It is for this reason that, altho it may require a long drawn-out effort to accomplish results, it seems important to discuss uniformity of prices as well as point-of-delivery prices. Indeed, it is hardly possible to discuss the latter without admitting the former. And since we must in a discussion of delivered prices admit uniformity, we are almost forced to defend uniformity or else leave the matter solely for others to condemn."[4]

He thereupon went on to state that the burden was upon the seller to justify his price and in the case of a dispute with the governor of a state who had publicized the issue it amounted to a dispute with the people of the state and must be dealt with by publicity directed to them. It was as a result of the general situation fairly outlined by this correspondence that at the meeting of the trustees on February 21, 1934, the chairman brought forward the matter of public relations and publicity. After discussion, the Trustees resolved:

"That a committee of not to exceed seven be appointed by the Chair to study immediately all phases of this matter of public relations, not confining its activities entirely to publicity, as such, and report back definite recommendations to the Board of a

[4] Com. Ex. 836-3 P-3 Q.

program and procedure to be followed, at the earliest possible moment."[5]

The chairman subsequently appointed B. F. Affleck, President of Universal Atlas, as chairman of this Committee and Blaine S. Smith, President of Penn-Dixie, J. J. Porter, President of North American, John Treanor, President of Riverside, Joseph S. Young, President of Lehigh, George F. Coffin, President of Nazareth and L. T. Sunderland, President of Ash Grove, committee members.[6]

Porter, a member of the Committee, testifying that the purpose of the Committee was to dispel widely held misconceptions concerning the industry and as to the activities of the Committee, stated:

> "A. Well, at about that time there had been a number of very vicious attacks on the cement industry by Government officials, and many of us connected with the cement industry felt that they were entirely unjustified, that they were based on total misconception of what we were doing, the reasons for it, and we felt that we were entitled to tell our side of the story and attempt to get a better understanding of our industry.
>
> Q. In Commission's Exhibit 950F and G, which is apparently a document that was prepared by your committee, there is also a reference to certain misconceptions regarding your practices. Will you tell us what were the misconceptions that your committee had in mind? A. Yes. There was a belief in some quarters that we were a monopoly all acting together; that the fact that prices were uniform at any given time and place in a good many instances was prima facie evidence of collusion and fixing those prices. There was a general misconception as to the profits of the cement industry, a general belief in certain quarters that the industry was making excessive profits. I think that covers the principal misconceptions.

[5] Com. Ex. 618 B.

[6] Com. Ex. 618 F.

Q. Without spinning this out, Mr. Porter, will you tell us in a few words just what your committee did or what it attempted to do to remove these misconceptions? A. Well, we discussed many methods of procedure and developed a great deal of difference of opinion among the members of the committee. However, there were three things that either were done or grew out of the activities of the committee, and which I recall. First was some advertising which was handled by the chairman of the committee; second was the Burns and Clark investigation of our marketing practices, which was not handled by the public relations committee; but which grew out of the discussions in the committee; and, third, certain contacts that were made with certain Government officials which also were not formally a part of the committee activities but which grew out of the committee discussions. I have in mind particularly a contact made by Mr. John Trainor with a Mr. Ferguson, who was then a Federal Trade Commissioner.

Q. Now, you referred to some advertising. Will you tell me whether or not you had in mind Commission's Exhibit 916-J, K, and L, in that connection? A. Yes, this is what I had in mind.

Q. Did your committee confer on those advertisements, Mr. Porter? A. No; it is my recollection that that advertising was handled entirely by the chairman of the committee and some advertising agency. I am quite sure that I never saw those advertisements until they appeared in print.'"[7]

The Committee held a joint meeting with the Tariff Committee of the Portland Cement Association on March 6, 1934 and discussed misconceptions in the minds of public officials, cement buyers and others, particularly as to f.o.b. destination prices and the reason for the identity of such prices and the ways and means of dealing with this problem.[8]

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[7] (R) Tr. 33916-18.

[8] Com. Ex. 844 K-N: Memoranda of joint meeting 3/6/34.

On March 15, 1934, the Committee submitted to the Trustees a plan for conducting a public relations campaign. It was approved for presentation to the members of the Institute in such manner as the Committee deemed suitable.[9]

Thereupon Affleck, as Chairman of the Committee, issued a circular letter dated March 21, 1934, to members drawing attention to attacks upon the industry by members of both federal and state governments, stating that "the cement business is in public disfavor," and asking for suggestions.[10]

On March 26, 1934, the industry was again circularized by a statement signed by the full Committee. After referring to price controversy in Illinois, threats of government owned plants in Tennessee and Illinois, attacks by Governor Horner and Secretary Ickes, demands by Congressman Brennan for another Federal Trade Commission investigation, the Code controversy with dealers and various state preference laws, resolutions and practices, the circular went on to say:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"A study of 2580 recent newspaper articles and editorials mentioning cement shows only 208, or 8 per cent favorable to our industry—92 per cent were unfavorable or indifferent.

* * *

Analyzing the various points which have been raised against the cement industry, the committee at work on the problem believes the task to be:

1. *Removal of misconceptions regarding our commercial practices.*
2. *Replacing these misconceptions with a favorable attitude based on appreciation of the outstanding contributions of our industry to public health, safety and comfort.*

[9] Com. Ex. 619 B, C: Trustees' Minutes, 3/14/34.

[10] Com. Ex. 950 B: Circular letter 3/21/34.

We must convince—

(a) public officials—federal, state and local.

(b) newspaper and other editors.

(c) individuals and groups in the trade.

(d) our own stockholders and employes.

(e) the general public.

Internal education, reaching class (d) is basic and should seek to make our own people enthusiastic about

—our commercial policies and practices.

—our contribution toward making America a better place in which to live.

A thorough job within our industry should give us hundreds of able helpers in putting our case before the public.

But there's no sense in trying to do the work unless we really want to do it, unless we're determined to see to it that the public shall understand us.

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

Our committee has prepared a plan which will be sent to you shortly for your consideration. *Meanwhile your views on the need of a program would be helpful to the committee. Please write promptly."*[11]

This appeal brought many letters to the Committee offering a variety of suggestions as to what to do, what to say, how to say it, and to whom to say it.[12]

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[11] Com. Ex. 950 F-G.

[12] Com. Ex. 950 N-O: Nicholson (National) to Affleck, 3/28/34.
Com. Ex. 950 P-Q: Davis (Standard) to Affleck, 3/24/34.
Com. Ex. 950 R: Beck (Great Lakes) to Affleck, 3/22/34.
Com. Ex. 950 S-U: Kanengeiser (Superior) to Affleck, 4/7/34.
Com. Ex. 571-5 C, 5 D: Horner (Kosmos) to Affleck, 4/13/34.
Com. Ex. 571-5 E, 5 F: McKee (West Penn) to Affleck, 4/7/34.
Com. Ex. 821-4 W: Moyer (Vulcanite) to Affleck, 4/4/34.
Com. Ex. 821-4 X-4 Z: Meyer (Green Bag of Pa.) to Affleck, 3/24/34.

Nicholson of National replied in part:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"I am wondering if we cement people might not gain if we followed the program of the packers when they were under five years ago. They published a good many advertisements giving figures to show they were not getting exorbitant profits."

He suggested advertising matter to be taken from the annual reports of cement companies and then went on to say:

"There is no trick bookkeeping in these reports. Practically all are the certified audits of public accountants. The government long ago established depreciation rates for cement plants on a sliding scale which averages about 6%. The losses shown above *are real losses*, felt by the companies in reduced working capital, in postponed improvements of plants, and by the stockholders in reduced or omitted dividends and the low market price of their stocks when cricumstances force them to sell.

* * * Only cement executives and cement stockholders know the facts. The paid advertisement offers the best chance to convince the public that cement is not only a splendid material—and how well the association is driving home that truth; but that it is sold at a fair price.

I'm just another cement treasurer who is tired of croaking and wants a chance to crow. Don't see much prospect of doing it until some way is found to break down this public prejudice against a fair price."[13]

Davis, Vice President of Standard wrote:

"There isn't any cure-all for conditions such as are confronting us, but, as stated before, if we make up our minds to do so we can start to offset this bad condition in our industry almost immediately. Small things eliminated prevent big things being created.

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[13] Com. Ex. 950 N-O.

[Italicised part quoted in Fdgs. Par. Twenty-one (c)]

My suggestion is we start a 'Good Will Club' in the industry. Pledge everybody to preach good will. Pledge ourselves and divorce from our minds because we are representatives and executives of a large industry that we can do no wrong, and I am making this statement as though I were of a larger company, and eliminate from the minds of your smaller competitors that you are constantly reminded of Shakespeare's quotation in your attitude toward your competitors and to your trade, namely, 'When I speak, let no dog bark'."[14]

Beck, President of Great Lakes, wrote Affleck:

[Italicised part quoted in Fdgs. Par. Twenty-one (c)]

"The quickest way to dispose of this matter is to give advertising matter to all of the papers in the United States—metropolitan, local and farm.

Quite a few years ago this same matter developed and the Advertising Committee of the Association at that time started a campaign of placing paid advertising in all of the metropolitan, city, county and local papers in the United States, amounting, I think, to from 4000 to 5000 periodicals—the smaller ones being handled through a press agency. The favorable result was almost instantaneous."[15]

Kanengeiser, President of Superior, wrote, saying among other things:

"Perhaps you have already given consideration to the employment of the highest grade publicity man possible or public relations man which you can obtain. If not, that fact might be worthy of consideration. In any event to gain the right attitude on the part of the public officials and publishers over the country, we's got to lay our cards on the table with the face up which we have not done in the past."[16]

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[14] Com. Ex. 950 Q.

[15] Com. Ex. 950 R.

[16] Com. Ex. 950 T.

Hogan, President of International (Lone Star), replied:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"Your letter of March 21st is timely. I cannot recall a time when the industry has enjoyed full public confidence. We are in this unenvious position even though we have done much as an industry to merit confidence. Through the Portland Cement Association, we have maintained an agency of public contact which has accomplished many constructive acts that have rebounded to the public interest. That ill will exists despite the high standing of the Portland Cement Association suggests we must look elsewhere for the cause.

Sporadic efforts to promote good will have consisted mainly of programs calculated to minimize or stifle newspaper criticism through the buying of space. This advertising carried a message calculated to lend importance and prestige to the industry which did not, however, reach the root of our trouble. Telling interesting facts about cement has failed to remove the public distrust which probably has its origin in the suspicion that a close working understanding, contrary to the public interest, exists between manufacturers. This suspicion is intensified by some of the industry's trade practices.

That some of these practices may be necessary does not remove the distrust arising from a lack of understanding and a failure on the part of the industry to meet the issue squarely in print and through its representatives in the field. We have to thank this representation to a considerable extent for the attitude which the trade holds toward our industry. Salesmen frequently intimate that company heads consult freely and are seldom able to explain convincingly why cement is sold in a certain manner.

Some of the conditions and practices of the industry which have contributed to the public distrust and enabled politicians to verbally chastise us without fear of reprisal are listed below. Some may be more typical of past performance than of present, but both past and present combine to influence the

public's attitude. That some practices are in the consumers' interest helps but little if they are misunderstood.

(1) Standardize product.

[The following paragraph is also quoted in Fdgs. Par. Twenty (e)]

The absence of quality competition between brands, refusal of manufacturers to bid on non-standard specifications at any price and the resistance which has been put forth by the industry to specifications calling for higher quality.

(2) Uniform destination prices.

The uninitiated are mystified by the industry's ability to anticipate competitor's price at a given time and place. The uniform refusal of manufacturers to bid mill prices has contributed to the misunderstanding.

(3) Uniform terms, sales, conditions, trade practices.

This uniformity which in the main is in the public interest is oft times construed as evidence of collusion.

(4) Lack of a binding contract.

Because a specific job contract is not a contract but an option to buy, duplication of bookings giving rise to the checking of contracts has in many instances proved annoying to purchasers. The misunderstandings and unpleasantness which accompanies a price change and the complicated rulings with which we have surrounded the marketing of cement both have their origin in the failure to provide a contract that is binding.

(5) Wasteful solicitation.

For many years there have been too large a number of men on the road resulting in an uneconomical and unwholesome scramble

for available business which has raised the question, 'Since money can be spent with such freedom, is the price of cement too high?' Some of these doubts have found confirmation in excessive entertainment in which the industry has indulged.

(6) Cross shipping.

The ability to buy at a distant point at a very much lower mill net than the manufacturer secures on short-haul business gives rise to a resentment having its origin in the feeling that those who live close to the mill should receive the most favorable price.

(7) The same price to all classes of users regardless of the volume purchased.

This is contrary to commonly accepted practice in the marketing of many commodities and results in resentment on the part of the large buyers, particularly those like States which are sold at small per barrel expense.

(8) Mills without base prices.

The toleration by the industry of those who poach in high priced areas has not created a feeling of confidence in the desire of management to protect the consumer.

(9) Concerted action on matters that are properly subject to individual company policy.

Many instances of this kind have resulted from States asking for bids on bases that differ from accepted trade practice.

(10) Limitation of competition to a point of sale struggle for an order with all natural differences between companies and products removed.

[The following paragraph is also quoted in Fdgs. Par. Twenty (e)]

It is usual in selling a product to claim advantages for it over the competition. These

advantages are advanced as a reason for buying a brand in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of the manufacturer's proposition.

It would seem that a logical approach to this problem lies in a careful, thorough and candid scrutiny of our entire marketing system. If we sit around the table and try to analyze the problem and prescribe a remedy for certain ills, both the analysis and the cure will be distorted by tradition and our own experience. Better it is, I think, to learn from the consumer, contractor, dealer, the politician and the well-posted individual, just what our supposed shortcomings are and what they feel we should do to correct them.

I would suggest that a committee made up of younger men in the industry who are familiar with marketing problems and have a knowledge of public relations be designated to conduct this investigation. I would further suggest that the actual contact with the trade and the public be through men not identified with the industry but skilled in making investigations of this type. Such a survey should seek answers to questions of which the following are typical:

(1) Have sales practices been determined in the manufacturer's interest or in the user's?

(2) Do existing sales practices promote the use of cement—assist or retard the Portland Cement Association in the development of new uses and in the expansion of the market?

(3) Is representation of a manufacturer a valuable asset or a necessary evil in the dealer's eyes?

(4) Does manufacturer solicitation create good will with the dealer, the contractor, and large buyers?

(5) What does it cost the manufacturer to sell each of the various classes of buyers? Do sales prices reflect these several costs?

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

after such a survey is made and the report with recommendations distributed, we can then reach a decision based upon facts rather than one based upon hunches."[17]

The Committee issued "A Public Relations Plan for the Cement Institute" dated April 10, 1934.[18] The Plan stated:

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

"1. To correct misconceptions regarding the practices of the industry held by

a. Public officials

b. The newspapers

c. The public

d. Other groups

2. To replace the misconceptions with a favorable attitude on the part of the aforesaid groups.

• • •

Suggested available themes were:

Concrete for Sanitation
Concrete for Comfort
Concrete for Health
Concrete and Labor
Service with Cement

The chief misconceptions to be removed are these:

1. That uniformity in bids is indicative of collusion
2. That the public would be benefited if prices were quoted f.o.b. mill

[17] Com. Ex. 553 X-C2.

[18] Com. Ex. 2190 A-J.

3. That cement prices are too high
4. That publicly owned cement plants are desirable or economical
5. That the industry's practices are unfair to dealers
6. That tariff protection is unnecessary

• • •

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

Methods to be Used

*a. *Personal contact*
b. *Public addresses*
c. *Printed matter*
*d. *Publicity*
*e. *Paid advertising space*
f. *Radio*
g. *Moving Pictures*

* *Personal contact publicity and paid advertising space should be the chief means employed.*

• • •

In dealing with public officials; personal contact by men who have the right address, entree and full information is important. These public officials fall, chiefly, into the following groups:

1. *Federal and State officials*
2. *U. S. Senators and Representatives*
3. *State legislators*
4. *City and County officials*

These contacts should be planned, scheduled and checked up by a central office. Printed work will go on at the same time, will prepare the prospect in advance of the call, will reinforce the effect of the call after it has been made."

The Plan continued for several paragraphs, outlining the problem of educating the public to support public offi-

cials in the viewpoints which they might take, pointing out that they could not be expected to act upon a favorable point of view while their constituents held an unfavorable one. The Plan then went on:

"Reaching
Other Groups

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

Newspapers must also be contacted. Here the contacts may be made both by cementmen and by representatives of the Public Relations Bureau.

Building material dealers misunderstood the industry. They have no notion of the way the industry builds business for them—nor of the cost of that effort. Here cement company salesmen can be used. Suitable printed matter should be available for use at and after their calls.

The following groups will be informed largely by the printed world but also, to some extent, through addresses to civic, professional, and other bodies:

The public
Business leaders and financiers
Contractors
Engineers and architects

Two
Fundamentals

No matter how clever the planning, adroit the arguments and skillful the execution, no matter if the expenditure be most liberal, a public relations program will fail unless at least two fundamentals are complied with:

1. *The proponents themselves must be fully convinced of the soundness of their case and of the need of presenting it.*

Specifically, for us, we must 'sell' the cement company executives and employees on

a. The necessity for our public-relations program

b. The soundness of our selling practices

c. The contribution which the industry makes to individual and public welfare

Unless this is done, we lose a very valuable selling force—our own employees—and we will not sustain the program long enough to make it effective.

2. We must be alert to prevent the development of unsound practices—those that might do injustice as between members of the industry or that might be unfair to our employes or the public. Our public relations cannot be sound unless our policies and practices, within the industry, and in relation to the public, are sound. In other words, we must always go before the public with clean hands.

The maintenance of sound practices necessarily compels us to think not only subjectively, that is, of the effect of policies upon ourselves, but objectively, that is, of the effect of the policy on the public. We must put ourselves in their place. We must see ourselves as the public sees us.

The Plan then stated procedure to be followed and the type of publicity which may be embraced in various types of literature, publicity matter, paid advertising, radio and motion pictures. It outlined briefly a personnel staff to supervise the work, and concluded with a statement of the 'Approximate Number of Leaders of Groups to be Convinced (Based on experience with mailing lists)' as follows:

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

1.	*Federal officials*	*695*
	State officials (including highway engineers)	*291*
2.	*Newspapers—primary list*	*2,500*
	—second class list	*2,500*
	Magazines and Journals	*250*
	General and Economic Writers	*200*
	Financial Editors and Writers	*305*
3.	*U. S. Senators and Representatives*	*531*
4.	*State Senators*	*1,661*
	State Representatives	*5,662*
5.	*County Commissioners*	*8,704*
	County Engineers	*2,200*
	Mayors and City Managers	*5,750*
	City Engineers	*2,120*
6.	*Building Materials Dealers*	*about 30,000*
7.	*Civic Leaders*	*7,500*
	Financiers	*15,000*
8.	*Contractors, all lists*	*40,000*
9.	*Concrete Products Mfrs.*	*6,500*
10.	*Engineers (civil)*	*2,100*
	Architects	*14,500*
11.	*Cooperating Organizations*	*250*
12.	*Other industries on common ground*	*4,674*
		153,853".

At the same time the Committee released a circular recommending immediate steps to conduct a public relations program to be carried out through the P.C.A. and to appropriate the necessary funds, at the expense of the Cement Institute.[19]

[19] Com. Ex. 439.

On May 10, 1934 the Trustees received a report that some of the districts had voted for and approved the plan of the Public Relations Committee and suggested rates of dues to finance the work, but several districts had not yet taken action. Treanor, President of Riverside, moved that it would be impractical to conduct such a movement without full support of members in each district and that district trustees should be earnestly requested to call meetings to secure this support. Treanor's motion was carried.[20]

On July 19, 1934, the Committee circularized the members with copies of the first three advertisements published by the Committee together with a circular to all employees drawing attention to the advertisements and to their purpose and soliciting interest in them in order that the employees might be better prepared to defend the industry and promote the use of cement.[21]

At a meeting of trustees on August 15, 1934 Affleck reported:

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

"Representatives of the committee discussed the proposals either formally or informally in all districts but one east of the Rockies. Except in this district, (#10) the underlying strategy of the committee's proposals has been generally approved although some details have been changed in accordance with suggestions submitted.

Proposals for beginning active work in any state or district have been temporarily held up. At the same time it seemed important to get started on something and in accordance with the approval of the trustees at the March meeting, the committee began a campaign in national media including such general magazines as Time, Business Week, United States News, and Editor and Publisher. Eight ads were used in these magazines. In addition two ads

[20] Com. Ex. 620 B: Trustees' Minutes.

[21] Com. Ex. 916 G-J.

were used in the following technical papers: Architectural Record, American Builder, Construction Methods, Engineering News-Record and Pencil Points.

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

In the series of eight ads, the first two were of an introductory nature designed to get the good-will of the publishers and the readers and the subsequent ads were on various phases of our marketing practices. This series is completed.

The expenditure so far totals, in round figures, $30,000.

At the meeting in Chicago, the trustees of the Institute also empowered the committee to employ the personnel needed to study the necessary angles of this subject and to carry out a public relations program. On vote of the members of the Public Relations Committee, Colonel John B. Reynolds was employed as of August 1 to head up the Public Relations Bureau.

Temporarily the staff of the committee is headquartered at the offices of the Portland Cement Association in Chicago. This has the approval of the President of the Association. If there is any question about this, this may be a good time to discuss it.

As mentioned in the Report of the Committee, a vote has been held in districts 1 to 9 inclusive. In some districts this was unanimous—in others it was by a large majority but not unanimous. It may be that representatives of districts 10, 11 and 12 present here today can advise regarding the status in their districts,'[22]

Affleck then moved that the expenses of the Committee to date and the employment of Colonel John B. Reynolds and such additional personnel as might be necessary be approved, and this motion was unanimously carried. An assessment for this work of one-half cent per barrel shipped from July 1 by all companies was approved.

[22] Com. Ex. 621 D-E.

The status of the Public Relation Plan in Districts 10, 11 and 12 was reported as follows:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"District #10—Trustee not present. Previous correspondence indicated disapproval.

District #11—No action taken.

District #12—All but two members approve."[23]

Illustrations of the advertising were introduced in evidence. They appeared under the following titles:

Ad No. 1.—"Prolonging Our Lives"
(Com. Ex. 434)

Ad No. 2.—"Progress in Cement"
(Com. Ex. 435)

Ad No. 3A.—"The Going Price"
(Com. Ex. 436)

Ad No. 4.—"Keen Competition"
(Com. Ex. 2835)

Ad No. 5.—"Buyers Get What They Want"
(Com. Ex. 2836)

Ad No. 6.—"Wheat and Cement"
(Com. Ex. 2837)

Ad No. 7.—"The Story of A, B & C"
(Com. Ex. 2838)

Ad No. 8.—"The Same Economic Law"
(Com. Ex. 2839)

In No. 4 of these advertisements, it was stated:

[Italicized part quoted in Findings, Par. Twenty (g)]

"Since portland cement is a standard product as uniform as any given grade of gasoline, sugar, or

[23] Com. Ex. 621 E.

wheat, buyers in any town or city will purchase it only from the cement plant that quotes the lowest delivered price. The lowest delivered price offered by a cement plant tends to pull prices offered by all other plants down to its level. Unless some plant ventures to quote a lower price, this lowest price—as in the case of gasoline, sugar, or wheat—is the price below which no plant will go to get the business."

In No. 5 of these advertisements, it was stated:

"Because buyers wanted a simpler plan of buying, manufacturers began selling cement delivered at destination instead of f.o.b. mill. This plan has been in use for more than thirty-five years. Under this plan the freight is included in the price the buyer pays for cement at the place where he wants it. *It is the simple and natural way to sell a standardized product like cement.*"

In No. 6 of these advertisements, it was stated:

"*Since cement is a standard product as uniform as wheat or sugar of any given grade, buyers at any point will buy it only from a cement plant that is quoting the lowest price.* Other cement plants, no matter where located, must meet this lowest price if they want the business. The lowest price becomes the going price."

In No. 8 of these advertisements, it was stated:

"*Since cement is a standard product, conforming to government specifications, buyers will buy it only from a cement plant quoting the lowest delivered price.* Other cement plants, no matter where located, must meet this lowest price, or fail to get any of the business."

On July 29, 1934, Treanor, President of Riverside, wrote to Smith, chairman of the committee, saying among other things:

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

"I haven't seen our recent advertising about the basing-point system. There was an ad on Horton's desk. I doubt if it is making a good impression. *I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed.*"[24]

On July 31st Treanor wrote to Mehren, President of the Portland Cement Association:

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

"Thanks for the proofs of the ads. They are well written and I think very good advertising for normal times. Neither do I think any serious offense can be taken at these ads by the Federal Trade Commission, or anyone else. *The worst that can be said is that the economic foundation, for some of these discussions of price making is frail. With that opinion I am inclined to agree, believing that no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement. This is not a subject which can be presented to the public through advertising, or in any way. It is an argument that has to be made and can be made in special places where it may be calculated to do some good.*"[25]

The Bureau headed by Colonel Reynolds became known as the Cement Information Bureau and at the Trustees' meeting on February 14, 1935 Affleck reported that its activities had gone forward along the lines originally approved; interest in the work of the bureau had been stimulated and the bureau had made contacts with special

[24] Com. Ex. 938 Y.

[25] Com. Ex. 938-2 A.

writers and financial editors. He stated that the bureau was then engaged in a study of labor relations with the assistance of the Labor Committee. An appropriation was made for the support of the bureau by the Trustees at this meeting.[26]

The work of the Committee in endeavoring to stimulate company executives to make contact with public officials in their states and to explain to them the economics and methods of the cement industry is illustrated by correspondence between Reynolds and C. B. Condon, General Manager of Hawkeye at Des Moines, Iowa.[27]

At their meeting on May 19, 1936 the Trustees approved a state legislative reporting service conducted by the Cement Information Bureau in the State of Pennsylvania.[28]

Affleck reported under date of July 20, 1935 to Reiter, General Manager of the Institute, on the activities of the Committee and the Cement Information Bureau which it conducted under the management of Col. Reynolds. After referring to the fact that the Trustees at their meeting of August 15, 1934 determined to hold the advertisement campaign in abeyance, the report outlined the work undertaken by the Committee as follows:

> "Under the direction of the Committee and with the cooperation of its members, a great deal of material has been compiled and disseminated to the industry itself as well as to individuals and agencies outside.
>
> The Bureau has opposed through publicity and in cooperation with members in affected territory, the construction and operation of cement plants by various governmental units or agencies. It has helped to keep Institute members advised of events directly or indirectly affecting the industry.

[26] Com. Ex. 622 D: Trustees' minutes.

[27] Com. Exs. 2233-2236.

[28] Com. Ex. 625 E: Trustees' minutes.

It has ascertained reactions of public opinion toward the cement industry by compilation and study of comment in newspapers and periodicals of many types. It has attempted to reply by written communication to such criticism of the industry in publications as has come to its attention.

It has supplied information regarding the industry on request. It compiled and distributed to the members certain information in statistical and graphic form in regard to basing price systems.

Effective contracts have been made with many leading writers and newspapers by means of personal calls and correspondence.

During the 16 months of its existence, more than 65 separate mailings of about 9,200 pieces of material, including letters, bulletins, reprints of news items, information regarding legislation, etc., have been made to member companies. During the same period, more than 11,000 pieces of publicity and printed material favorable to the industry have been sent in six mailings to special writers, public officials, newspapers and magazines.

The series of Institute advertisements with imprinted messages was mailed at the request of 44 member companies to more than 23,000 employes and stockholders.

Assistance has been rendered to officials of the Portland Cement Association in compiling figures needed for certain Association activities, especially in connection with the 'Cement and Concrete Reference Book.' The statistics included in this book and parts of the subject matter were prepared by the Bureau, and distribution of the book was under its supervision except to members of the Association. The book was sent to public officials, libraries, special writers, and newspaper editors. For the book soon to be issued the same work has been done.

There has been built up a thoroughly reliable and current mailing list of selected special writers, newspaper and magazine editors and others which has been available for instant use when needed.

There has been the closest cooperation wherever possible with other committees of the Institute as

for instance in the preparation of newspaper and magazine stories for the industry. The Bureau has worked also with local materials committees in endeavoring to create public opinion opposed to erection of state barriers.

For the Labor Committee a detailed study was made of conditions in other industries, together with methods used successfully while strikes were in progress. This study is now in the process of final completion and when approved by the Labor Committee will be distributed to members of the industry for their use. Included in the report also will be an analysis of public relations activities of other industries and certain suggestions of applicability to the cement industry. It has been the privilege of the Bureau to furnish certain members with this type of information when they are faced with the possibilities of labor trouble themselves.

The Tariff Committee has indicated its desire to have the assistance of the Bureau in future tariff activities in behalf of the industry.

In anticipation of future advertising campaigns, a survey was made of opinion in several communities in an effort to determine what erroneous ideas in the minds of laymen, architects, contractors, dealers, etc., should be the subject of this effort. The survey was reproduced and distributed to the membership.

During the time action on the so-called Wagner Labor Relations Bill was pending in the House of Representatives, a special committee was appointed by the President with the authority of the Board of Trustees, and Colonel Reynolds of the Bureau was assigned to duty in Washington for the purpose of adding such force as might be possible to the opposition of other factors of industry to this piece of legislation. Reports which have been received indicate that the contribution of the industry in this respect was of value and that, in spite of the passage of the Bill, the joint effort of the cement and other industries will be of lasting benefit to all of them. Colonel Reynolds has received appointment as a member of its Committee on Public Activities by the National Association of Manufac-

turers through Mr. C. L. Bardo, President. This is in connection with a movement toward the safeguarding of American industry, and his appointment may be considered a tribute to the cement industry.

At present some thought is being given to the possibility of establishing within the Bureau a service to the industry whereby legislation in the various states, especially in regard to taxation, will be scrutinized and information thereto supplied to interested member companies immediately so that opposition, where necessary, can be organized in time to be effective. With the present tendency of taxes to increase, this should be of great value to the industry. Whatever may be done in this connection will, of course, be submitted to the proper authorities for approval before being undertaken."[29]

The Trustees at their meeting on September 10, 1936 at which they received the report of the Future Activities Committee and drastically curtailed the activities of the Institute, passed a motion to the effect that the services of Col. Reynolds be discontinued immediately.[30] With this the work of the Committee came to an end.

7. Marketing Research: Burns-Clark Survey

During the controversy between government officials and members of the cement industry over the price of cement to be purchased for the building of the Tennessee Dam by T.V.A. John Treanor, President of Riverside had made the representations on the part of the industry. He got into this situation through his acquaintance with Dr. Arthur Morgan, the Administrator of T.V.A.[1]

The discussions in that matter had brought Treanor into contact with a number of Federal government officials

[29] Com. Ex. 1032 A-F.

[30] Com. Ex. 626 E: Trustees' Minutes.

[1] *Supra*, Part IV E 5 b i, p.

and had impressed upon his mind the fact of criticism and suspicion of the cement industry predicated upon misconception of its economics and its methods and he came to believe that it was essential to the welfare of the industry to remove these misconceptions.

Treanor discussed with members of the industry and with members of the Federal Trade Commission and others the possibility of a joint study of the cement industry's position and its methods. On July 29, 1934 he wrote Blaine S. Smith, President of Penn Dixie:

> "Please confer with the boys and wire me whether I shall forward the enclosed letter to the Commission.
>
> I have reason to believe that things were about set to proceed with a suit to test the basing-point system as a collusive practice forbidden by Sec. 2 of the Clayton Act. If this study proceeds, I think this will not be done.
>
> I spent practically all day yesterday conferring with Commission staff members. I am well satisfied with the results. If we can go ahead with the study I feel sure we can transform the attitude toward the cement industry. I feel sure, once they understand our business, there will be no resentment of efforts confined to making a fair profit.
>
> I haven't seen our recent advertising about the basing-point system. There was an ad on Horton's desk. I doubt if it is making a good impression. I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed. There were one or two remarks about the N.E.L.A., which, of course, is in very bad repute.
>
> My cousin, William Stanley, is the ranking Assistant Attorney General. He took me in to Assistant Attorney General Stephens, in charge of anti-trust cases. A friend of mine, a professor of Harvard Law School, had also written him. Mr.

Stephens received me with extraordinary kindness. After hearing my statement he called Chairman Ferguson, saying that he had met me by chance, through these connections, knew nothing about the merits of my position but did know that I am a reliable person that the Commission can treat with confidence. Stephens also introduced me to Mr. Hardy, special assistant who prosecuted the cement case. I returned to Hardy's office later in the day for quite a thorough discussion. He was much interested in the analysis presented to the Commission. I couldn't want a better attitude.

Please send Mr. Hardy a copy of the letters when they are ready. Also to Dr. L. S. Lyon of Brookings Institution. Also MacFadden.

Dr. Lyon is an old friend of mine. I had dinner with him last night and we talked until midnight. You know, I presume, that he is now very influential in the N.R.A. He strongly criticises and opposed the 15% clause on government bids. Thought it scandalous for the government not to take the dose it prescribes for the public.

Lyon is a staunch defender of the open price but opposed to the waiting period. He would have secret rebates and manipulations, such as price raids, severely punished. That, he says, is all the aid to restraint of competition we are entitled to or that it is good for us to have. He also criticises VI, VII, and VIII of our code—the ones we are ready to scrap.

Lyon is inclined to believe N.R.A. will and should be continued and is in favor of a strong commission to handle it.

I went over my analysis of the cement industry carefully. He was especially impressed with the points about the basing-point system. I am to send him the Ferguson letters to read carefully. It is my own opinion that if we could get Brookings Institution, at moderate cost, to cooperate in the Federal Trade Commission study, it would turn out a better, fairer job and would serve to prevent an unfair or prejudiced interpretation. We must have someone. Brookings would be persona grata with

Commission and undoubtedly would influence economic interpretations.

David[2] told me he had spoken to you about Clark.[3] Clark is aware of our kind of problems and would be my choice next to Brookings. He must be approached most carefully or he won't consider it. Let me know what you think of sounding Brookings out, without commitment. Their prestige is, of course, very great, and the value of their opinion would mean more to us than any individual's. This is the way to spend what little money we have just now, not in advertising.

I saw Dr. Reave of T.V.A. I think he is chief executive officer or something of the sort. He knew almost nothing of the cement matter in detail and was most interested in my story. Please send him a copy of the Ferguson letters. I promised them. I think Reave is very well balaneed. He is a factor to reckon with.

I believe I should forward this letter to the Commission promptly. It is expected and is part of the procedure arranged. The Commission will next act, asking me to see if I can interest the industry. Mr. MacFadden approves and tells me Col. Donovan does so, in general."[4]

The minutes of the Trustees' meeting on August 15, 1934, recite:

"The Chair requested Mr. John Treanor to place before the Board the results of his visits with the Federal Trade Commission. After the discussion which followed Mr. Treanor's remarks, the Board was canvassed and it was practically the unanimous sense of the meeting that the Industry should fully cooperate with the Federal Trade Commission.

The meeting recessed for luncheon and after luncheon the following Resolution was offered by

[2] Probably Dr. Paul David, Economist on the Staff of T.V.A.

[3] Dr. J. M. Clark, Professor of Economists, Columbia University.

[4] Com. Ex. 958 F-G; 938 Y-Z.

Mr. Young seconded by Mr. F. H. Smith and unanimously carried: to wit:

Be it RESOLVED

That the Board of Trustees of The Cement Institute believes that it is in the interest of the industry and of the public to promote sincere and truly cooperative studies concerning problems in the distribution of cement, and

Be it further RESOLVED

That the Board highly commends Mr. John Treanor for his personal efforts to explain cement problems to government agencies, and

Be it further RESOLVED

That the Chairman of the Board is hereby authorized to appoint a special committee to facilitate cooperation between government agencies and individual cement companies, and

Be it further RESOLVED

That the said committee—to be known as The Marketing Research Committee—is hereby authorized to retain such economists or other experts and aides as may be necessary to discharge its functions and to incur other necessary expenses, subject to the approval of the President of the Cement Institute, and

Be it further RESOLVED

That the Board specifically approves a cooperative study of methods of marketing cement on the part of members of this industry in collaboration with the Federal Trade Commission, and the Board hereby requests each member of the industry to accept the invitation of the Federal Trade Commission and the opportunity afforded by it to pursue a joint study of marketing facts and problems to the end that current individual methods of selling

and distributing cement may be more generally understood or improved.'"[5]

The Chairman appointed Blaine S. Smith, President of Penn-Dixie, Joseph S. Young, President of Lehigh and F. M. Coogan, Vice President of Alpha as the original members of this Committee.[6]

On the same day, Treanor wrote to Garland S. Ferguson, Chairman of the Federal Trade Commission, as follows:

> "After talking with you on July-twenty-seventh, I talked with several members of the Commission staff, including Mr. Horton, Mr. Wooden, Mr. McIntyre, Dr. Stephens and Dr. White.
>
> Interest was centered upon the basing-point system. I suggested, as an example of the industry cooperation which I advocate, that a study might be made to discover just how the basing-point system does work under varying trade conditions.
>
> I suggested that data might be collected for a period of great building activity, during which the demand for cement was uniform throughout the country with most of the mills operating at full effective capacity. Such a period might be found during the years 1924-26.
>
> Another period might be chosen when great diversity of demand occurred in the several local markets. Some portion of the year 1930 might furnish such an example.
>
> Again, a period of uniform low demand could be taken from the records of 1932-34.
>
> Those data can be correlated with cost data, selling prices (both destination and *net* realized prices) freight rates, etc. A good idea will thus be gained of the mechanics of distribution under the basing-point system.

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[5] Com. Ex. 621 B-C.

[6] Com. Ex. 621 F.

The same data can then be used for studies of the mill-price system under varied assumptions. Very sound inferences can then be drawn as to the probable behavior of the several local markets under the influence of such a system. The important questions to be answered would be: probable effect upon cost of cement to the public: effect upon present investments of the industry; upon required cement capacity; upon rate of utilization; upon the railroads; upon changes in railroad rates; upon company ownership of transportation, etc.

The staff members seemed interested in the possibilities of such a research as a guide to wise governmental action. I understood them to be personally in favor of embarking upon it, provided the full, frank cooperation of the industry can be assured.

I explained to these gentlemen that I had no right to speak for the industry. Before writing the present letter, however, I have taken the precaution to consult men representing a large majority of the producing capacity of the country and have been assured of their cheerful cooperation. There are other producers whom I have not been able to reach, who are entirely unaware of the discussions which have been taking place. These men will have to be informed of the nature and objectives of the proposed study before their cooperation can be obtained.

It would give me great pleasure to bring this matter to their attention and to the attention of the industry as a whole. The immediate purpose would be to obtain a competent analysis of the troublesome basing-point question—such analysis to be based upon accurate concrete data.

There is another, more important purpose which I have in mind. This is to establish such a relationship between my industry and the Commission that any matter deemed to be of public interest may be studied and discussed upon a plane of mutual confidence and respect. If this relationship can once be established, the Commission will thereafter be

assisted in all its proceedings by the complete, unreserved, and candid cooperation of the cement industry.

I believe that this relationship of confidence will result naturally from the basing-point inquiry, whereby the Commission will learn how ready and sincere and complete is the industry's desire to cooperate.

I would not care to make the effort to bring about these results unless I receive an indication that the plan has the Commission's approval.

The specific plan for the basing-point study will, of course, be formulated to yield the desired results with the minimum of trouble and expense to the industry. I assume that the industry will appoint an economist of standing to confer with the Commission's staff upon the details of the research.

As I expect to be in Washington later in the week, I will call at the Commission's office in case you are ready to discuss this matter further at that time."[7]

Sometime prior to October 2, 1934, Treanor was appointed Chairman of the Committee, and on that day he was again in Washington in conversation with the Federal Trade Commission. From there he wired Blaine S. Smith—

"TRADE COMMISSION DEVELOPMENTS YESTERDAY VERY GOOD BUT TODAY THEY SEEM STALLED STOP AM NOT SURE THAT IT HAS REAL SIGNIFICANCE STOP REGARDLESS OF OUTCOME I THINK IT WISE TO GET SOMEONE LIKE PROFESSOR CLARK AT WORK ON OUR PROBLEM I AM TO MEET HIM FRIDAY FOR FULL DISCUSSION AND WOULD LIKE TO ARRANGE MEETING OF MARKETING RESEARCH COMMITTEE YOUR OFFICE SATURDAY MORNING TO REPORT AND POSSIBLE ADOPT PLANS."[8]

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[7] Resp. Ex. 3766 A-C.

[8] Com. Ex. 953-1 E.

The following day, Treanor wrote Commissioner Ferguson concerning a suggestion made by the Commissioner the day before that Treanor file a memorandum describing the contemplated study which Treanor was trying to persuade the Commission to undertake in cooperation with the industry. Treanor quoted from his letter of August 15th, previously set forth, and then after referring to the statement of the Commissioner that the Commission's staff was so far under the pressure of other work that it was almost impracticable for the staff to undertake the cement inquiry as proposed, concluded his letter by saying:

> "I suggested that if the Commission would authorize its economic staff merely to confer with economists provided by the industry, a large amount of useful data might be collected and put in form for consideration by the Commission at some later period when its staff may be working under less pressure.
>
> My purpose in asking for conference is to make sure that such research activities are directed to matters deemed useful and important by the Commission. The effect of conference with the Commission staff, and cooperation, which can be conducted so as to take a minimum of the time of the staff, will be greatly to advance the study of an important subject of general interest.
>
> May I here repeat what I have said to you more than once in conversation: If this study is undertaken, it is not our idea that the Commission, on that account, will refrain from or defer any action which it might otherwise take upon any matters relating to the cement industry which may now be pending.
>
> My earlier letters to the Commission have been written in my personal capacity as a member of the industry. I write this letter as Chairman of a Committee authorized by the industry to make arrangements with the Commission in furtherance of this general plan of study."[1]

[1] Com. Ex. 958-1 M-1 N.

On October 5th, Commissioner Ferguson replied to Treanor, stating:

> "Your letter of October 3rd has been received and considered. The Commission appreciates the spirit of cooperation that you express on behalf of the cement industry and there is no disposition to minimize the value which may result from such a study as you suggest.
>
> Your letter and oral statements indicate your appreciation of the problems which the Commission must consider. Among these are the facts that the Commission has already conducted and completed a series of investigations of the cement industry and that its staff is too limited to permit substantial diversion of their attention from other industries which have not received as much attention as yours.
>
> The Commission is glad to have your assurance, as Chairman of a committee authorized by the industry to handle this matter, that there is no thought of restricting in any way the freedom of the Commission to take any action which it might otherwise take. The importance of this reservation is emphasized by the fact that there are pending before the Commission a large number of important complaints, from both private and governmental sources, regarding practices in the cement industry, and the Commission must of course remain free to dispose of these complaints without awaiting the results from your proposed economic investigation.
>
> Subject to these conditions, the Commission accepts the proposal made in your letter to the effect that members of our economic staff be authorized to confer with economists provided by the industry concerning the character and form of data to be obtained by the industry through its own efforts. It should be understood, however, that members of our staff who may advise with economists selected by the industry have many other matters on hand and will have to subordinate their attention to this to whatever extent their other duties may require.
>
> It should also be understood that any expression by members of the Commission's staff in the pro-

posed conferences is purely advisory and in no way binding upon the Commission as to the adequacy, usefulness or validity of the data or the conclusions that may be drawn therefrom."[10]

Treanor reported to Conn, President of the Institute, in writing, reviewing his conversations with the Federal Trade Commission and the Commission's unwillingness to proceed with the study at the time, stating:

"The Commission is unwilling to proceed with the basing-point study at the present time. Several influences may lead to their refusal of which I will mention the following:

(1) Shortage of staff. The Commission is actively engaged in studies of the steel industry, the milk industry, and the textile industry, in addition to its normal and routine activities. The Commission is proceeding on its usual budget. It has not been the recipient of special appropriations.

(2) The Commission has received frequent, and I judge recent, complaints about the cement industry. These arise from the various national Departments, from some divisions of N.R.A., from state officials, as well as from private sources. The Commission fears that our proposal of the joint study, is a ruse to avoid or delay action upon pending matters.

(3) The Commission is somewhat uncertain about its own future status or at least as to its future function, in relation to N.R.A. and to the President's recently appointed Industrial Committee headed by Mr. Richberg.

* * *

The lawyers of the Commission appear mildly opposed to the study preferring to stand upon the record of the past investigations. They prefer not to be hampered by implied obligations to delay ac-

[10] Com. Ex. 958-1 W.

tion pending the outcome of further studies which cannot possibly be completed before six or eight months.

Neither the legal nor economic staff which has heretofore handled cement investigations know of any specific proceeding contemplated against our industry. If the Commission has anything in mind, it is probably not specific, but merely a general attitude of suspiciousness encouraged by recent complaints.

* * *

In view of all the circumstances, I concluded in my own mind that it was well to suspend further effort to bring about the cooperative study at this time, and proceed to our own independent study by economists of known competence and character. The Commission economists seemed pleased to think this might be done. I mentioned Professor Clark's name to Dr. Francis Walker. He doubted Prof. Clark's willingness to make the study but intimated that if he did so his conclusions would be entitled to the greatest respect and would receive serious consideration by the Commission."[11]

On October 6th, Treanor wrote to Dr. John M. Clark and Dr. Arthur M. Burns of the Columbia faculty as follows:

"This letter, written on behalf of the Cement Institute, is intended to state briefly the effect of our recent conversations.

The basing-point system of marketing as practiced by the cement industry has been criticized as against the best public interest. We want this subject competently and impartially investigated. If a practicable system which better serves the public interest can be found, the industry wants to adopt it. If desirable modifications of the present system can be suggested, the industry wants to adopt them, if they are practicable.

The industry will give earnest assistance by supplying factual material.

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[11] Com. Ex. 958-1 J-1 L.: Letter dated 10/5/34.

> The report, when completed, is to be submitted solely to the Cement Institute for the use of its members and its staff. The report is not to be published, either in whole or in part, without the consent of both parties to its preparation—that is, the Institute and yourselves as authors."[12]

On the same day, Treanor wrote Conn, reporting that arrangements had been made with Professors John M. Clark and Arthur R. Burns of Columbia University—

> "* * * to conduct an investigation of the marketing problems of the cement industry. The effects of the multiple basing-point system are to be especially investigated from the standpoint of the public interest, as well as that of the industry. * * *
>
> The report, when completed, is to be for the sole use of The Cement Institute and its members, excepting as they may desire to extend its use."[13]

The following day, Treanor wrote to the Professors stating that in view of Chairman Ferguson's letter of the 5th, it was appropriate to modify their understanding insofar as if provided that the findings were to be submitted solely to the Institute.

> "We now contemplate that they will also be available to the Federal Trade Commission. You are also hereby authorized to discuss with complete openness all the details of the investigation, while it is in progress, with the economists of the Commission."[14]

At the same time Treanor replied to Commissioner Ferguson and after acknowledging the Commissioner's letter of October 5th, stated:

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[12] Com. Ex. 953-1 N.

[13] Com. Ex. 958-1 U.

[14] Com. Ex. 953-1 P.

"Your decision will also encourage the entire industry when it is communicated to them."

The letter went on to report the retention of Clark and Burns and set forth the subject matter of their inquiry as stated in Treanor's letter to Clark and Burns on the day previous.[15]

A further letter to Drs. Clark and Burns by Treanor on October 6th stated the membership of the Marketing Research Committee to consist of Coogan, Vice President of Alpha; Smith, President of Penn-Dixie; Young, President of Lehigh; Conn (ex officio) President of the Institute and Treanor, Chairman of the Committee and President of Riverside. Due to the fact that the chairman would be in California most of the time the letter states that Smith had consented to act as vice-chairman and advising them that "Mr. Smith speaks for the Committee in all matters without reservation." The letter drew attention to data which they would receive through Mallory, the Institute's statistician, and then stated:

"I think all members of the Committee would like to consider the form of your questionnaires pretty carefully before they are finally adopted. Some of the information required will be of a confidential nature, which you may have to receive direct under promise that it will not be disclosed to any member of the industry. Such data could not pass even thru Mr. Mallory's hands, and you will have to arrange yourselves for its propet handling. All of this can be worked out in consultation with Mr. Smith."[16]

Burns replied to Treanor on the 10th acknowledging letters of the 6th and 7th of October and stating they appeared to the writer to set out quite accurately the arrange-

[15] Com. Ex. 958-1 Y.

[16] Com. Ex. 971-1 B-1 C.

ments reached in the course of conversation and expressing satisfaction with the arrangement for discussion with the economic staff of the Federal Trade Commission and "your authorization of completely free discussion of the matter."[17]

Writing to E. J. Mehren, President of the Portland Cement Association on October 15, 1934 concerning his conception of the purpose of the study being undertaken by Professors Clark and Burns, Treanor wrote:

> "While this is called a basing-point study, because that is the thing the Federal Trade Commission is immediately interested in, I do not conceive it as limited to that one purpose. In fact, a thorough study of the basing-point system will inevitably embrace a survey of our trade practices as a whole."[18]

On November 4, 1934, Dr. Burns wrote Smith enclosing copies of a draft questionnaire for consideration by committee members and enclosing also a memoranda suggesting questions upon which the Professors desired advice and criticism. The letter stated that the writer was communicating with the Federal Trade Commission, submitting a copy of the proposed questionnaire and suggesting a conference.[19]

Treanor wrote Smith on November 19, 1934, referring to a letter from Smith on November 17th and stating:

> "1. The Trade Commission has always taken the position that for the investigation to be of value as a study of the relative merits of the basing-point and the mill-price systems, costs of production in the several mills must be obtained. I made this clear in my several discussions of the matter before the Institute. It is specifically included in my pro-

[17] Com. Ex. 958-2 P.

[18] Com. Ex. 571-1 K.

[19] Com. Ex. 571-2 Y-2 Z.

posal to the Commission inviting investigation, dated August 13th and October 3rd, 1934.

2. As to the need of checking individual questionnaires, this also was discussed at different times with representatives of the Trade Commission, not precisely in the form stated in paragraph 4 of Professor Clark's memorandum of November 12th, but generally in the sense of that paragraph. This was merely informative so far as I was concerned. I was not asked to say the individual mill figures could be checked and of course I had no authority to commit anybody and did not pretend to commit anybody. On one occasion at least when this subject was being discussed, I remember that two attorneys of the Commission were present in addition to the economists. They explained to me that the Commission has never *agreed* at any time not to make use of any information it acquires, even though from confidential sources, in any proceedings which may come before it. However, they told me that as a matter of policy the Commission had never in its history disclosed any information given voluntarily with the expectation that it would be treated confidentially. They told me of a long wrangle with one of the other important departments of the government (I have forgotten which) which was seeking to obtain information known to be in the Commission's files, which however was furnished voluntarily in a bona fide effort to assist the Commission. The Commission as a matter of policy and of good faith refused to disclose this information and prevailed in its refusal."[20]

Treanor again wrote Smith on the same day and after referring to discussions had concerning the proposed questionnaire continued:

"I am also on the whole satisfied with the attitude of the Federal Trade Commission as indicated by the report of the conference with Messrs. Stephens and White. Their comments are fully in the spirit

[20] Com. Ex. 953-3 G-3 H.

of the conversations with me. It is clear that they are taking this investigation seriously and will regard it as an important contribution to the industry marketing problem. It is clear they contemplate that this investigation may make it unnecessary for the Trade Commission to conduct its own investigation of these questions. That is a situation which I think we should be very anxious to bring about.

The important point which I think should be presented to the meeting is this: cement marketing practices are not going to go *uninvestigated*. The investigation can be an impartial, scientific one, conducted by competent people, in the light of continuous suggestion and interpretation of data by representatives of the industry who will have access to the finished report before it is presented to the Trade Commission (or the public if we see fit to publish it) thus affording the industry opportunity to suggest modifications if the report seems unfair in any respect. Or on the other hand, it can be an investigation by the Federal Trade Commission, more or less in its capacity of a policeman, more or less influenced by the known inclination of prosecutors to make out a case. In such event it will not be an impartial, scientific investigation and finally it will be a secret investigation, so far as we are concerned, with little or no opportunity afforded the industry to explain and interpret their trade practices as the study proceeds.

These are the two alternatives which confront our industry. I vote with all my heart for the first of the two and hope that an attitude of unreserved cooperation in the Clark-Burns investigation may be adopted by all the members of our industry."[21]

Smith wrote to Treanor on January 17, 1935 upon the progress of the proposed questionnaire. He stated that he had had two 3 hour sessions with the Professors and that the questionnaire was now corrected and boiled down to a point where the Committee as a whole should review

[21] Com. Ex. 953-3 I-3 J.

it for final analysis and conclusion. The letter said, inter alia:

> "* * * Some of the detailed questions have been eliminated. This has been partly possible because the professors are getting to understand the question better and also they are appreciating that a good deal of the information they originally intended to seek by questionnaire can, as a matter of fact, be secured from the Committee in the form of figures, charts, and general information.
>
> We are preparing a chart of all base prices at all base points in effect January 1, 1925, showing also the dates and the measures of each change up to January 1, 1935. These base price figures will be net in package, that is, after deducting cash discount and package, but not deducting bulk differential. Thus, differences in package charges, if any, and in discounts, will not confuse the figures. Our Traffic Manager, Mr. Browder, who is helping me in this work, wrote you today asking if you would undertake the preparation of facts and figures of this character for the Pacific Coast; similarly, we are asking Mr. Morse, of Boettcher's companies, for like information to cover the Mountain region. Everything east of the Mountains we think is now in accurate shape thru coordinated work of Universal Atlas, Lehigh, Lone Star, and our company. In other words, we think the records of these companies are comprehensive for all territory up to the Mountains.
>
> The professors are willing to use the Price Waterhouse cost data collected about one and a half years or so ago for the country, which are, as to capacity, 83% representative, you will remember, instead of having another cost questionnaire go out to all companies. It will be necessary, however, to get the permission of all those who supplied figures to Price Waterhouse to turn them over for the confidential use of the professors. I am drafting now a form of request which will also ask for certain selling cost figures not previously supplied to Price Waterhouse, and I will send this to you in draft form for approval within a few days.

> In addition to the basing point statement above referred to, we are preparing for the professors other studies in the form of charts, maps, and statements."[22]

On February 8, 1935 Smith wrote the other members of the Committee stating that he had enclosed copy of draft of the questionnaire for the industry prepared by the professors and attaching with this letter a list of questions also prepared by the professors to serve as agenda for discussion at a meeting with the professors and the Committee. The list of questions enclosed involved an explanation of port prices, zone prices, duplicate base prices, base prices of limited geographical application, sales to Federal government at prices calculated by the use of land grant rates and special rates to the government, sales to railroads, sales to public authorities, the use of water transportation rates in calculating delivered prices, sales for delivery to trucks at the mill, and any other cases in which delivered prices are not the base price plus the all rail cost of transportation. The list of questions asked further for information on the use of silos and grinding plants, non-basing point mills and the effect of the basing point system upon price competition.[23]

The Trustees at their meeting on February 14, 1935 heard a report from Mr. Treanor on the work of the Committee and the preparation of the questionnaire, and it was unanimously—

> "RESOLVED that when the questionnaire is prepared the President of the Institute should communicate with all members calling their attention to the importance of the questionnaire and requesting prompt and complete reply."[24]

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[22] Com. Ex. 571-3 A-3 B.

[23] Com. Ex. 956-3 P-3 V.

[24] Com. Ex. 622 C.

At the request of Treanor, the President appointed Conn, the president of Giant a member of the Marketing Committee at this meeting of the Trustees.

Dr. Burns wrote Young, President of Lehigh on March 19, 1935 that he and Dr. Clark had conferred with the economists of the Federal Trade Commission "to obtain final confirmation of the questionnaire before it was printed. Their suggestions for amendment were, for the most part verbal and can be accepted, I think, without formal confirmation of the Marketing Research Committee."[25]

When the questionnaire was about ready to be issued, Treanor put in the hands of the Committee the draft of a letter to members of the Institute in the following terms:

> "With this letter we are forwarding a questionnaire which has been prepared by Dr. John Maurice Clark and Dr. Arthur R. Burns of Columbia University for the purpose of collecting information which will enable them to analyze the effects of the present methods of selling cement. It was prepared with the cooperation of the Marketing Research Committee pursuant to a plan which has been frequently discussed at meetings of the trustees of The Cement Institute. Since it is now presented for the first time to the individual members of The Institute it appears advisable to review some matters about which the trustees are already informed.
>
> The Marketing Research Committee was created early in 1934 to deal with widespread criticism of the industry's marketing practices, particularly of the multiple basing point system of price making. Opposition to the system had gone far among officials in state, local and federal governments. Press articles had widely reflected the adverse feeling in official quarters. The members of the industry sincerely believed that this disapproval was based upon misunderstanding of the marketing problem of the industry. They were not conscious of any purpose inconsistent with correct business and economic

[25] Com. Ex. 913-7 B-7 C.

practice. They felt required to maintain their position, respectfully but firmly, believing that nothing but confusion would result from sweeping change not well adapted by analysis and study to the nature of the industry.

However, this position imposes an obligation to disclose all desired particulars of the industry's commercial practice to some competent independent agent of investigation and criticism. It is not only an obligation of good citizenship, it is a practical necessity to do so. No experienced person can suppose that an industry acting in its own interest will long be allowed to resist the purposes of responsible government officials, without clearly justifying their position. The Marketing Research Committee was created to devise ways and means to reconcile conflicting public and private viewpoints. If the industry's selling methods are against the public interest they must be changed. If modifications can be suggested which are at once desirable and practicable, the industry should adopt them. If the existing system is fair, its fairness should be recognized by the public and by the officers of government alike.

The Committee began by discussing the whole question with the Federal Trade Commission, the agency of government charged with the regulation of commerce. An approach to the Commission had already been made by members of the industry acting as individuals and upon this foundation the Committee tried to build. It tried to arrange a cooperative study of the questions involved. Undoubtedly such a study could have been arranged but for the heavy burden of work already upon the Commission and but for the limitation of its personnel and appropriations. The merit and sincerity of the industry's proposal of a joint study were cordially acknowledged by the Commission.

Failing to obtain direct cooperation with the Commission, the Committee endeavored to accomplish the desired result indirectly through independent investigation by economists whose competence and integrity of purpose would be acknowledged by

the Commission. It retained Messrs. Clark and Burns to conduct the study along the lines which had been informally approved by members of the staff of the Federal Trade Commission. The accompanying questionnaire has received the informal approval of the Commission's economic staff. The returns and the final report will be available for consideration by the Commission, possibly as a substitute for a formal investigation on its own part or as a supplement thereto.

Messrs. Clark and Burns are economists of the highest professional standing. They are peculiarly fitted to consider marketing problems where, as in the cement industry, high overhead costs are controlling factors. Their findings will be unimpeachable from the standpoint of fairness and sincerity. From the standpoint of economic interpretation their work will command the respect of the Commission and of economists throughout the United States."[26]

The letter closed with a strong appeal for cooperation on the part of every member of the Institute, and was signed by the members of the Marketing Research Committee. Treanor also submitted the draft to be sent by the President of the Institute which, after referring to the questionnaire and the effort which had been put on its preparation by members of the Committee and the professors after consultation with economists of the Federal Trade Commission, continued:

"* * * It is an effort to gain understanding and approval for our industry in so far as its commercial practices are proper; and to correct practices, if any there be, which are improper. It is an effort, by the reasonable procedure of study and discussion, to effect the readjustment of public and private view points—matters which in the past have too often suffered from blindness and prejudice on both sides.

[26] Com. Ex. 284 I-J.

As President of the Cement Institute I wish to cast the full weight of my position in favor of the faithful completion of this questionnaire. If the returns are carefully made by each and every member of the industry, without exception, it will stand to our lasting credit and open the way to sound public relations."[27]

The questionnaire, finally printed and distributed to members of the Institute on April 13, 1935,[28] was in two forms. One, for non basing-point mills, covered 140 separate questions many of which pertained to four different selected months, namely, June 1925, January 1928, June 1932 and January 1933, together with an elaborate tabulation of the net yield at mill. A modified questionnaire of similar character with 200 inquiries was prepared for basing-point mills. A set of special questions were prepared for mills that had changed from basing-point to non basing-point and vice versa, since January 1, 1925. Another special supplementary questionnaire was issued for chain mills and a further supplementary questionnaire for mills at which at any given time since January 1, 1925 there had been two base prices in operation. The amount of work involved in answering the questionnaire evidently brought inquiries and protests to the President of the Institute, for on April 27th, Conn, the President of the Institute, wrote to Carpenter, the President of Beaver:

"Recently I had one or two letters from manufacturers complaining about the amount of work involved in answering the questionnaire recently sent out. In both those cases I replied as follows:

'I agree with you that there is an immense amount of work in connection with the questionnaire of Messrs. Clark and Burns. My own or-

[27] Com. Ex. 284 K.

[28] Com. Ex. 593 A: Letter dated 6/19/35, Lundborg, Secretary of Institute to Reiter, General Manager of Institute.

ganization is naturally in the same position. I have discussed the various phases of it with our Mr. Robeson as to its importance, and we, frankly, have made up our minds that we just must find the time to cooperate by giving the material requested.

The survey, which Messrs. Clark and Burns have undertaken, is at the direct insistence of the Marketing Research Committee, who have already given a great deal of not only their own time but of their various staffs. In order to make this survey of the value that it should be to the industry, it has been necessary for this Committee to develop much more information than that which is required from those of us who are not on the Committee.

The way to decide for yourself would be to weigh the amount of time and labor necessary to develop the information against the advantages. What the Committee is endeavoring to do is, through the offices of Messrs. Clark and Burns, to develop a comprehensive study of our business so that we may defend our method of price-making.

You know from your contacts and your reading of the attacks that are being made in various quarters against the basing system. We cementmen with our marketing experience know the absolute necessity of our present method of marketing. Consequently, there is an obligation on the part of each and everyone of us to furnish as much material as we can, which will enable us to defend ourselves against future attacks, especially in view of the fact that the Blankenhead bill is now pending in Congress.

The Commiftee in conference with Messrs. Clark and Burns has worked this questionnaire to the point where the maximum amount of valuable information can be secured with the least trouble to the members of the industry. If it were possible to eliminate all or any part of this questionnaire, the Committee naturally would have been in favor of doing so.

Without complete cooperation from all members of the industry, Messrs. Clark and Burns are apt to get the impression that the industry is not cooperating with them and is holding back for reasons better known to themselves. I am sure all cementmen will realize that we could not permit this to happen. It was for this reason that the Marketing Research Committee sent along its special letter, and I in turn sent along the letter as President of The Cement Institute, asking all manufacturers to cooperate to their utmost.

'It is my judgment that any sacrifice you make in the way of labor and time will repay you a hundred-fold.'

I think this answers how I feel about them, and I do hope everybody in The Institute, or for that matter out of The Institute, will do their very best to answer as much of the questionnaire as is possible."

The exhibit notes upon the heading that the same letter had been sent to fourteen other manufacturers.[29]

There followed correspondence of some volume between the companies and the professors, most of it in the form of requests by the professors for a fuller explanation

[29] Com. Ex. 966 H-I.
A. B. Shelby, Calaveras
E. E. Duque, California
Coy Burnett, Monolith
C. T. W. Hollister, Northwestern
W. P. Cameron, Olympic
R. B. Henderson, Pacific Portland
John Treanor, Riverside
Geo. R. Gay, Santa Cruz
F. H. Powell, Southwestern
R. K. Neill, Spokane
Edwin P. Lucas, Superior, Inc.
A. Emory Wishon, Yosemite
W. H. George, Cowell
Eugene Enlow, Idaho

of certain of the answers and part of this correspondence appears in the evidence.[30]

The questionnaires, when answered, were sent directly to the professors[31] and were produced under a subpoena and appeared in the evidence as Commission's Exhibits 967-970, 972-976. These exhibits include the answers of fifty-nine different manufacturers.[32]

As to the purpose which manufacturers had in answering this questionnaire and their understanding of the merit of doing so, several gave testimony. Manley, General Manager of Hawkeye, in his stipulation stated:

> "(53) Witness recalls a so-called Marketing Research Committee of The Cement Institute. The Hawkeye Company understood that the function of that committee was to provide for an independent study, by economic experts, of the marketing methods of the cement industry. The Hawkeye Com-

[30] Com. Exs. 956-5 R, 14 Y-14 Z, 15 C-15.E; 971.

[31] Reiter, General Manager, Institute (C) Tr. 3140.

[32]
Aetna
Allentown
Alpha
Ash Grove
California
Castalia
Colorado
Consolidated
Coplay
Cumberland
Dewey
Diamond
Edison
Federal
Florida
Georgia
Giant
Glens Falls
Hawkeye
Hercules
Hermitage
Idaho
Keystone
Kosmos
Lawrence
Lehigh
Lone Star
Louisville
Medusa
Monarch
National
Nazareth
Nebraska
North American
Northwestern States
Oregon
Pacific Coast
Pacific
Peerless
Penn Dixie
Petoskey
Pittsburgh
Republic
Riverside
Santa Cruz
Signal Mountain
Southern States
Southwestern
Spokane
Superior
Superior Portland
Three Forks
Trinity
United States
Universal Atlas
Volunteer
Vulcanite
West Penn
Yosemite

pany received a questionnaire prepared by Professors Clark and Burns. (Commission's Exhibit No. 976-12 W - 13 H.) In answering that questionnaire the Hawkeye Portland Cement Company understood that the purpose was to furnish the facts and materials regarding the marketing methods and practices prevailing in the cement industry. These methods and practices had been criticized by certain Government officials and politicians and it was the desire of the Hawkeye Company to have its methods and practices plainly understood. The Hawkeye Company had no contact with Professors Clark and Burns other than in submitting its answers to said questionnaire. In answering this questionnaire the Hawkeye Company presented the facts as it found them. There was no effort on the part of Hawkeye Company to influence Professors Clark and Burns, and the company has no knowledge or information of any alleged influence by anyone in the cement industry."[33]

Brooke, Vice President of Monarch, testified:

"A. Well, it was my understanding that it was to be a study of the methods of the industry by disinterested parties, with the view of determining whether or not we were doing things in a logical way; that is, marketing cement in the best and most logical way."[34]

Moore, Vice President of Dewey, testified:

"We understood that the questionnaire was to be taken into consideration; that is, our answers were to be taken into consideration by Messrs. Clarke and Burns, along with answers to questionnaires that were to be submitted by other companies, and a fair and unbiased summation be made therefrom by the Professors of practices prevalent at that time in the cement industry.

[33] (R) Tr. 41621-22.

[34] (R) Tr. 42226.

> We understood that there had been reports relating to the industry and its practices that had been broadcast by uninformed persons that were detrimental to the industry.
>
> This was a move to try and counteract those influences.'[35]

Dr. Burns wrote to Smith on June 25, 1935 concerning various matters of inquiry upon which the professors still desired data and indicated that the replies to the questionnaires were coming in very slowly but they hoped soon to have enough to begin the statistical analysis which they contemplated.[36] He wrote again to Smith on July 10th acknowledging information about the industry from the Committee and again propounding questions.[37]

Treanor wrote to Smith on September 11, 1935 commenting on the nature of the work being done by the professors and saying inter alia:

> "Personally I am well pleased with the tone these men are taking. It is friendly, not dogmatic, and our main points have been established in their minds, to-wit, the importance of 'overhead' and 'idle capacity' in our industry, which make old fashioned unrestrained competition simply unworkable and some form of market control necessary. I am sure you recognize, as I do, the importance of having a pronouncement upon this subject from men of the professional standing of Clark and Burns (Clark in particular being in the front rank and an authority upon this especial phase of industry). This is especially true since their views are based upon the most complete industry data which has even been assembled. It is now our business to convince them that the particular solution of this marketing problem, which we use in the cement industry, is not hurtful to the public. I think we can do so.

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[35] (R) Tr. 46952 a.

[36] Com. Ex. 958-3 C-3 E.

[37] Com. Ex. 958-3 J-3 K.

Clark raises two interesting questions in this letter of August 30th—what he refers to as the 'group mill base', and the cost of cement in relation to general construction costs as stated in the last paragraph of his letter.

It seems fortunate to me that at this stage of their work we find ourselves in frank, friendly correspondence. Discussion can no doubt be continued until we have made our points as clear as we are capable of making them, and our views will be thoughtfully considered.''[38]

And again on September 27th, Treanor wrote to Smith referring to a letter from Dr. Clark in which the Doctor made a suggestion that determination of the price at a given basing point "should not be left solely to the selfish interest of the mill located there", on the contrary that some industry responsibility should be involved in fixing the price levels. The letter went on to say:

"Now this is a very fruitful idea. It struck me at once that all of you boys would have a great deal to say about it. Progress toward order and cooperation would result from the general establishment of this principle. A first step in getting it established would be the considered opinion of such people as Clark and Burns in a formal report.

I have my ideas about this subject but our basing-point problems in California are so simple compared with yours that I would not venture to record an opinion with Dr. Clark without your guidance. I think today that this Clark-Burns investigation is just as important as I thought it the day it was organized and it was a little of a disappointment to me not to hear from the members of the Committee with a rather detailed expression of views upon the subject discussed above, as well as all the other matters which have passed across the counter in the last year. It seems to me this is our opportunity to knit them all together in a statement which will

[38] Com. Ex. 913-4 H-4 K.

make amends for the imperfections of earlier statements and pick up the various loose threads. I would be glad to try to formulate such a thing, submitting it to the Committee for approval before turning it in, if the Committee wants me to try it. If I do not hear from you within a reasonable time I will make a perfunctory answer to Clark's letter and let it go at that."[39]

On October 3rd Smith wrote to Treanor concerning the progress of the professors' studies and the assistance given them by members of the Committee:

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

"Joe Young and I have been just now discussing the progress that has been made in connection with the survey of the industry now being conducted by Professors Clark and Burns, particularly in reference to your last two letters to me, copies of which have also been sent to other members of the Marketing Research Committee.

At the outset, we should like to make it clear to you that every effort has been and will be exerted by the members of the Committee to clear up whatever points of doubt or dispute may still exist in the minds of the professors. I understand that considerable correspondence has passed between Dr. Clark and Joe Young in connection with the operation and effect of the Lehigh marketing plan. I, personally, have answered dozens of inquiries, sometimes on my own responsibility and more often after consultation with certain members of the Committee. Personal contact with the professors has, of course, been impossible during the summer months, because of their absence from the city, but, short of the actual interchange of ideas across the table, I believe that we have conducted as intelligent and as comprehensive an interchange of ideas as possible under the circumstances.

You suggest in your last two letters that it would be desirable for each member of the Commit-

[39] Com. Ex. 958-4 O-4 P.

tee to sit down individually and frame his own personal answers to the several fundamental points raised by Dr. Clark in connection with your admirable report on the marketing conditions in the cement industry, submitted to the Federal Trade Commission last year. Altho your first request along these lines was received by members of the Committee at least two weeks ago, I believe that all of the members of the Committee have been reluctant to comply with your suggestion for the same reasons which prompted me to delay answer.

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

Altho all of the members of the Committee in the East have had in mind the same objective that you evidently are striving for, namely attempting to mold the professors' minds before any definite conclusions have been reached, it has been our thought that much more could be accomplished by personal contact than thru the medium of correspondence. The plan that we have discussed is simply to arrange a meeting shortly with the professors, to which would also be invited—in addition to the members of the Committee—certain sales and traffic experts with general knowledge and wide experience, preferably from companies other than those represented by the Committee. The professor could possibly prepare in advance a list of questions that had proved particularly bothersome. These questions could be submitted to the group of cement men and we would attempt to have those best qualified discuss the points involved with the professors until the matter was thrashed out to everyone's satisfaction. By adopting this procedure we felt that we could more comprehensively and more completely answer the many points that unquestionably have arisen in the minds of the professors in reviewing the answers to the questionnaire form.

While the method that you have suggested perhaps will bring about the same desired result, there is every reason to believe that the statements that you would receive from the members of the Committee in answer to the several points submitted to you by the professors would be at variance and pos-

sibly in direct conflict. For example, in your last letter of September 27th, you ask for the opinion of the individual members of the Committee on the question of the determination of general price levels, particularly in reference to the selfish interests of non-basing point mills. Perhaps one reason why questions have been raised by the professors on this point is because of the answer submitted by the Lehigh Portland Cement Company to ¶18-B of the questionnaire, which called for a criticism of the report of the Federal Trade Commission on practices in the cement industry. In passing upon the report of the Federal Trade Commission, Lehigh makes quite a point of the variation in the general price structure the country over by reason of the fact that each mill or group of mills does not constitute a basing point. It may be that certain other members of the Committee may take an entirely different view, and there is no question but what certain groups in the industry would flatly challenge any such contention. Therefore, I frankly doubt the wisdom of attempting to obtain statements from members of the Committee on questions upon which there is so little agreement.

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

Please turn this matter over in your mind and, if you still feel that some good might flow from an interchange of views by correspondence on certain of the subjects upon which the professors would like further enlightenment, I will be delighted to discuss the matter further with the committee. *If you are inclined to agree with our views on this matter, will you kindly let me know when you next intend to be East, with the thought that a general meeting between the professors and the cement group could be arranged to suit your convenience.*

Joe Young concurs in the thoughts expressed above."[40]

When Coogan, who was also a member of the Committee, was on the stand, this letter was drawn to his at-

[40] Com. Ex. 571-2 L-2 N.

tention and the sentence involving the phrase "mold the professors' minds" read to him and he was asked whether the letter described his objectives and whether it was one of his objectives to mold the professors' minds. Coogan answered:

> "A. I received a copy of the letter which is referred to, and I read it over. It was my own objective to simply see that the professors or economists had all of the correct and true information on which they could arrive at an appraisal of the cement industry, and I am quite sure that Mr. Smith's letter does not—at least, to me, did not mean anything except trying to give them the whole truth and the whole picture of our industry."[41]

On October 7, 1935, Treanor wrote to Smith. He advised that it seemed unlikely that he could attend a meeting of the Committee to discuss the subject of study with the professors since "Mrs. Treanor is becoming quite averse to letting me travel by air." He stated his desire to resign as Chairman of the Committee and his feeling that the reason initially prevailing for his having accepted the chairmanship was no longer valid.[42] This letter in its tone presaged the outcome of physical difficulties then besetting him. Mr. Treanor died before the end of the year.[43]

The slow and painstaking work of the professors is indicated in correspondence with Smith after the questionnaires came in. For example, Burns wrote Smith on March 9, 1936 referring to information as to port prices being collected and furnished by Browder, the traffic manager of Penn-Dixie, and the desire of the professors to get similar material for zones. The letter refers to the fact that they are then revising the first chapter of their study and Dr. Burns enclosed some six separate questions

[41] Coogan, Vice President, Alpha (R) Tr. 23946-47.

[42] Com. Ex. 958-4 T-4 U.

[43] Beckett, President, Riverside (R) Tr. 42877-78.

relating to transportation costs, trucking price bases and the disposition of fractions in calculating freight rates.[44] Mr. Smith answered these inquiries with painstaking care and submitting data which must have been secured from several sources.[45]

Burns wrote to Smith on March 30, 1936 saying:

> "I enclose another copy of our prepared statement on the basing point system, which has been amended in several respects on the basis of our recent conversations."[46]

On the same day Smith presented before the Senate Interstate Commerce Committee on the Anti-Basing Point Bill (Wheeler Bill) a prepared statement dealing in part with the basing point system, part of which appears in the record.[47]

Smith reported to the Trustees on May 19, 1936 that the Committee expected the first two chapters of the report of the economists on June 1st and the remaining four chapters by August 1st,[48] indicating a manuscript of six chapters. At their meeting on June 19th, however, Young in the absence of Smith reported that Clark and Burns had completed about three-fourths of their report in tentative form which would be submitted to the Committee within a week or ten days and that the report should be completed and ready for distribution within thirty or forty-five days.[49]

Burns wrote to Smith on June 15, 1936 stating that he enclosed the first installment of the draft manuscript "on

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[44] Com. Ex. 958-5 C-5 D.

[45] Com. Ex. 958-4 W-5 B: Letter dated 3/17/36.

[46] Com. Ex. 971-25 L.

[47] Resp. Ex. 3745 A-E. See also Com. Ex. 2878 D-E.

[48] Com. Ex. 625 C.

[49] Com. Ex. 603 C: Institute Minutes.

the basing-point system". He explained that this was rather less than half of the chapters but more than one-half of the total volume. He states that a large part of the value of the questionnaires "lies in the fact that for the first time they make it possible to measure some of the consequences of the basing-point system". He emphasized, however, that the material was still in draft form and might require a good deal of change but that the authors of the report were anxious to get the reaction of members of the industry. He enclosed a draft table of contents which indicated the following chapters:

"THE BASING POINT SYSTEM IN THE CEMENT INDUSTRY
1925 – 1934

I. The Basing Point System and Methods of Selling Cement.

II. The Basing Point System and the Theory of Competition and Monopoly.

III. Specific Features of the Cement Industry Bearing on the Character of Competition.

IV. The Direct Effect of the Modified Basing Point System Upon the Sales Revenue of Mills: Base Mills.

V. The Direct Effect of the Modified Basing Point System Upon the Sales Revenue of Mills: Non-Base Mills.

VI. The Price of Cement.

VII. Competitive Pressures on Prices.

VIII. The Costs of Production and Marketing.

IX. The Importance of the Basing Point System as a Factor Influencing Prices and Costs as Compared to Other Characteristics of the Cement Industry.

X. The Probable Effects on the Cement Industry of Various Proposals for Modifying Basing Point Systems.

XI. Summary and Recommendations.

XII. The Relation Between Marketing Systems and General Economic Stability (Tentatively Projected)."[50]

Smith wrote to Conn on July 2nd that the first five chapters were then in the hands of Committee members and that as soon as each member had digested it the Committee would get together for discussion to be followed by meeting with Dr. Burns or with both Burns and Clark, upon Clark's return from Europe. Smith stated that he hardly expected the work to be completed before the end of October.[51] The minutes of the Trustees at their meeting on December 17, 1936 record:

> "Mr. Blaine S. Smith as Chairman of the Marketing Research Committee made a verbal report indicating that the work of Economists Clark and Burns has been more voluminous than was expected and the corresponding report itself has become more comprehensive. The Economists' report in its present form will be divided into nine chapters of which five have been reviewed by the Committee. Manuscript for three additional chapters should be in the Committee's hands before the end of January, whereupon the Committee will discuss and analyze the material. The concluding chapter is not yet written and its completion awaits considerable additional work both by the Economists and the Committee. Mr. Smith suggested to the President the addition of Messrs. D. S. Browder and J. C. Bowen to the Committee inasmuch as these two members of the Industry had handled considerable work for the Committee. Mr. Smith stated that because this

[50] Com. Ex. 958-5 J-5 L.

[51] Com. Ex. 958-5 N.

report could not be completed and printed for some months, an expense for 1937 would be occasioned by the Committee's work not contemplated when the 1937 budget was approved by the Board at its meeting on September 10, 1936, and presented an itemized budget indicating such 1937 Committee expense at $6,350.00 and moved that this budget be approved as an additional expense to be paid from surplus of The Institute. Motion was seconded by Mr. Rader and unanimously carried."[52]

The Committee, by appointment of the President, at that meeting consisted of Blaine S. Smith, Chairman; J. C. Bowen, D. S. Browder, C. F. Conn, F. M. Coogan and J. S. Young.[53]

On December 22, 1936, Smith wrote to the other members of the Committee:

"Attached is memorandum I just received from Dr. Burns, which I told you of the other day, dealing with possible modifications of the basing point system. In transmitting the memorandum, Dr. Burns says:

'There are blanks in the memorandum at one or two points where we feel that we cannot make our suggestions more specific without the benefit of discussion with members of the Committee. We are anxious that the memorandum should be fully discussed before we proceed to the drafting of the final chapter of the report. Perhaps you will be good enough to let me know when you are ready to meet us for the purpose of this discussion.' "[54]

Coogan, a member of the Committee, could not recall any discussion at meetings of the Committee concerning the suggestions of the professors.[55]

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[52] Com. Ex. 627 C.

[53] Com. Ex. 627 D.

[54] Com. Ex. 958-5 o.

[55] Coogan, Vice President, Alpha (R) Tr. 24993-94.

On May 18, 1937 Smith reported to the Trustees that "some progress had been made by Professors Clark and Burns since the last board meeting and that the Committee hoped to have most of the manuscript within a few weeks", and adding that there would still be a great deal of work for the Committee to do after receiving the report.[56]

On May 25, 1937 Burns wrote to Smith stating *inter alia*:

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

> *"With further reference to my recent telephone conversation with you, I have now mailed mimeographed copies of the last two chapters of the study. These are the chapters which I then promised as the next instalment of the work.* * * *
>
> *There now remain four chapters which you have not seen.* * * *
>
> * * * I hope that my absence will not cause any inconvenience. *I shall do my best to see that the whole of the balance of the study is handed to the stenographer before I leave. I imagine that this material will take some time to digest and that active discussions leading up to the final preparation of the material for publication can be taken up as soon as I return."*[57]

On June 18 Smith wrote to the members of the Committee enclosing drafts of Chapters VIII and VIII A that day received from Dr. Clark.[58] On August 13 Smith called a meeting of the Committee to be held August 20, 1937 in New York.[59]

The record does not carry the affairs of the Marketing Research Committee beyond this date.

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[56] Com. Ex. 628 B: Trustees' Minutes.

[57] Com. Exs. 913-1 D, 971-29 D.

[58] Com. Ex. 913-1 A.

[59] Com. Ex. 913-2 N.

Several witnesses were examined by Counsel for the Commission in an effort, apparently, to establish that the work of the Committee and the employment of the professors were with the sole purpose of preparing a defense of the so-called basing point system. Hogan, President of Lone Star, had testified that he did not regard Treanor with his experience in Southern California as a man acquainted with marketing problems of cement in the greater part of the United States. His testimony continued:

> "Q. Would you say that, despite the fact he served as chairman of the marketing research committee—— A. I would still say that.
>
> Q. (Continuing) —And despite the fact he was shown to have been selected as emissary to employ Dr. Burns and Dr. Clark in writing up the defense of the basing point system for the Cement Institute—— A. When were they employed for that purpose?
>
> Q. It is August and September, 1934, according to the record. A. That wasn't why they were employed, in the first instance.
>
> Q. Why were they employed? A. To make a study of the cement marketing practices.
>
> Q. For what purposes? A. For the guidance of the cement industry.
>
> Q. And not to educate the public on what the leaders in the industry thought they were doing? A. No, that was not the object of that. The study was made just the same as you would go out and hire a surveyor to make a survey.
>
> This was done in the Cement industry just to see what was going on in the marketing situation."[60]

Browder, Traffic Manager, Penn-Dixie, questioned with the same purpose apparently in mind to establish that the employment of Clark and Burns was all part of a public relations campaign, testified:

> "Q. What part did you play in the Public Relations Committee work of The Cement Institute, Mr.

[60] (R) Tr. 34737-38.

Browder? A. None. I have not had any connection with the Public Relations Committee.

Q. Don't you consider that the work of Professors Clark and Burns was related to the Public Relations Committee work of The Cement Institute. A. I did not understand that it was, no.

Q. It was a matter of attempting to explain to all people the operation of the basing-point system in the cement industry, wasn't it? A. No, I did not understand that.

Q. What did you understand to be the significance of the work of Professors Clark and Burns and the Marketing and Research Committee? A. The Marketing and Research Committee was to undertake a cooperative study with the Federal Trade Commission as to practices in the cement industry through economists.

• • •

Q. Was that still your understanding when you were called in as a member of the Marketing and Research Committee and handed portions of the report to read and review along with Mr. Blaine Smith and Mr. Joseph Young before it was to be published and criticize it? A. I do not recall now that there was any public relations arrangement in connection with it. It was all the joint study by these economists of the Federal Trade Commission and Doctors Burns and Clark as to the practices of the industry.

Q. Can you cite anything that you consider as evidence of cooperation between the Federal Trade Commission and the Marketing and Research Committee of The Cement Institute? A. As I recall now, the questionnaires before they were sent out to the various cement companies were submitted to the Federal Trade Commission for criticism or suggestions, and as I understand it the Federal Trade Commission did finally abrogate any understanding we had about a joint study, and it was then carried as a study by these economists, Drs. Clark and Burns, without the joint cooperation of the Federal Trade Commission.

Q. What do you base your understanding on in that respect? A. As I recall it now, it was conversations that Mr. John Treanor had with members of the Federal Trade Commission.

Q. You did not participate in those, did you? A. No, I did not participate in those, but in conversations, subsequent conversations with him I understood that the Federal Trade Commission had withdrawn their cooperation or their joint efforts in the matter.

Q. And were to have nothing more to do with it?

* * *

A. No, I did not understand that the Federal Trade Commission was to have nothing more to do with it. As I understand that, all of this was to be handled with a certain amount of cooperation from the Federal Trade Commission. I did not know that they had——

By Mr. MacIntyre:

Q. What did you mean by the word 'withdrawal' of the cooperation you just referred to? A. Well, as I say, at first it was my understanding that it was to be a joint study by economists of the Federal Trade Commission and Drs. Clark and Burns, and that later the Federal Trade Commission withdrew the direct cooperation of their economists in this, and the study was simply to be made by Drs. Clark and Burns and submitted, and so forth, and handled, in so far as they could, in cooperation with the Federal Trade Commission.

Q. Do you know of anything of any move that Professors Clark and Burns ever undertook to submit anything that they prepared to the Federal Trade Commission subsequent to that?

* * *

A. No, not of my own knowledge, I do not know of anything that they did after the submittal of the questionnaires.'"[61]

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[61] (R) Tr. 38541-45.

And again, when Bowen, Vice President of Lehigh, was on the stand, the questioning took the same course and witness testified:

"Q. I am asking what the Lehigh Company did with reference to any attempt to influence the Institute or other members of the Institute, regarding price policies. A. You stated price policies, now. I understood you to say in the first instance sales policies.

Q. Well, sales policies or price policies. A. Mr. Wooden, except for such discussions as may have taken place during the Code period, I know of no case in which the Lehigh Company has attempted to influence the Institute or any member thereof as to sales or price policies.

Q. Do you still make that answer, notwithstanding the Lehigh Company's participation and your participation in the work of the Marketing Research Committee through 1936 and 1937? A. Yes, I do. I don't consider that general research into any subject constitutes an attempt to influence the Institute or its membership.

Q. Well, weren't you attempting, in that research, to find ways and means of defending and maintaining the basing-point system? A. No, Mr. Wooden. I considered the work of the Marketing Research Committee to be one of studying the entire field of cement marketing. If that research showed that there was anything wrong or unsound about our methods of selling, or if that research could eventuate in any better or sounder or more acceptable method of selling, we surely wanted to know it.

Q. In other words, it was still an open question in the industry as to whether the basing-point system should be continued or maintained? A. Mr. Wooden, I have repeatedly said that I do not consider that there is a basing-point system in the cement industry in the sense that it has frequently been described, and, so far as I am concerned, so far as the Lehigh Company was concerned, our in-

terest in the work of the Marketing Research Committee was to have that committee shed whatever light it could on any phase of the marketing of our product so that we might have been able to have the best information we could for our guidance.

Q. You say there was no attempt to mold the minds of the professors who undertook that study? A. To the extent that conversations between people result in molding each other's minds, of course. I know that I, myself, have had several talks with the professors in which we have ranged over the whole field of marketing, both from the practical and theoretical standpoint.

Q. And in so doing you were not attempting to influence sales policies of any of your competitors? A. Not a bit of it. I was listening, in those discussions, as much as I was talking."[62]

[62] (R) Tr. 27300-01.

PART XII

THE NRA CEMENT CODE

[As noted in the Foreword to Appendix A, respondents have assigned error to the action of the Commission in receiving in evidence or giving any consideration or weight in making the Findings to all of the evidence digested in this Part. This includes all evidence except the post NRA evidence at pp. 2157-66.]

A. Preparation and Approval of the Code.

Following the passage of NIRA in May 1933, and immediately upon the reorganization of the Institute and the revision of its Articles for the purpose of increasing its representative character,[1] the newly constituted Board of Trustees took under consideration a Code of Fair Competition as originally drafted by counsel.[2] The Board adopted it subject to confirmation after it had been submitted to members of the industry through their respective district trustees for ratification.[3] The members of the industry within the next ten days held meetings in New York and Chicago in which they voted by districts. These meetings were open to all members of the industry and non-members of the Institute participated.[4]

The respective district trustees reported their criticisms and suggested revisions proposed at these district meetings.[5] These were discussed by the trustees at meetings

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[1] See Part X, Sec. A 3 b, pp. 1813-17.

[2] MacFarland, President of the Institute (R) Tr. 31106-08; Resp. Ex. 2173 A-E: Trustees' Meeting, 6/15/33.

[3] Resp. Ex. 2174 A-C; Com. Ex. 605 A-C: Trustees' Meeting, 6/16/33.

[4] Hartley, Sales Manager, South Dakota (R) Tr. 41539-40 (Com. Ex. 1228).

[5] Rooney, Vice President, Huron (R) Tr. 33665.

on June 27 and 28, 1933 and a revised code embodying many of the suggestions made by members of the industry was adopted.[6] At this meeting the Washington Contact Committee, composed of C. F. Conn, President of Giant, B. S. Smith, then President of Penn-Dixie, and L. T. Sunderland, President of Ash Grove, was appointed and charged with the duty of taking the Code as adopted to Washington for approval and report to the trustees in the event that the Code in its then form was rejected.[7] A further committee, known as the Control Committee, to supervise any further revisions of the Code, consisting of B. H. Rader, Vice President of Lehigh, R. B. Henderson, President of Pacific, and C. L. Hogan, President of Lone Star, was appointed.[8] An Executive Committee of the Board of Trustees was also appointed.[9]

The Washington Contact Committee submitted the Code as thus adopted by the trustees to the NRA on July 19, 1933. The Code as thus submitted provided in Article IX—"Method of Quoting, Market Stabilization", *inter alia*:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"a. *Except in cases where the Committee permits otherwise, all cement quotations and sales shall be F.O.B. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold F.O.B. plant, in the event land-grant rates may be availed of by the Federal Government in arriving at the delivered cost.*

b. No discrimination shall be made in prices, terms, and conditions of sale at the same time and

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[6] Com. Ex. 606 A-J.

[7] Com. Ex. 606 G-I.

[8] Com. Ex. 606 I.

[9] C. F. Conn, Chairman, G. S. Brown, R. B. Henderson, S. W. Storey, C. Struckmann, L. T. Sunderland, B. S. Smith.

place of delivery between purchasers or users in the same class and similarly situated."[10]

At an informal meeting with the NRA it developed that changes would have to be made. The Committee revised the draft embodying the NRA suggestions and presented it to the trustees on July 26.[11] The Committee conferred with NRA again on July 27 and additional revisions were made at NRA's suggestion and the Code as so revised was circulated in the industry. Criticisms and suggestions made by members of the industry were considered by the trustees on August 15 and 16 and a further revised draft was written.[12] The Contact Committee again conferred with NRA and received further suggestions and after further revision still another draft was adopted by the Board at its meeting of August 23 and 24.[13] Upon the filing of this revision on August 26, the NRA Administrator set September 15 as the date for the public hearing.[14]

In anticipation of this meeting, Conn, President of the Institute, wrote on August 31, 1933 to Sunderland, President of Ash Grove, and Young, President of Lehigh:

[Italicized part quoted in Fdgs. Par. Seven (p).]

"The Washington Contact Committee in reviewing the procedure at the public hearing (date for which it is expected will be announced to-day), feels that it is important that preparations should be made in advance to reply to criticisms and objections which may be offered at the hearing from within or

[10] Com Ex. 556, pp. 6-7.

[11] Com. Ex. 607 A-G: Trustees' Meeting, 7/26/33.

[12] Com. Ex. 608 A to O: Trustees' Meeting, 8/15-16/33.

[13] Com. Exs. 609 A-H, 610 A-D: Trustees' Meetings, 8/23/33, 8/24/33.

[14] Resp. Ex. 125 A-D: Conn, *supra*, report to members, dated 11/23/33.

without the industry. *We therefore request that you gentlemen give consideration to the provisions in the Code and in the supplements thereto, relating to price control (including defense of the present level of prices) and the universal practice of quoting delivered prices only, so that you may be prepared to make a brief statement in support of any phase of this subject, if called upon to do so.*"[14a]

At the hearing all interested parties, cement manufacturers, cement dealers, cement users, labor representatives, and others, if any, who wanted to be heard, had an opportunity to state their suggestions and criticisms and thereafter the Contact Committee conferred constantly with representatives of various divisions of the NRA and also committees appointed by the Deputy Administrator composed of representatives of various groups interested in the cement industry as dealers, contractors and users.[15] The draft as further revised by these conferences was reported to the trustees at this meeting in Washington on October 25th[16] and 26th, and after some further amendments the trustees approved the Code as so revised.[17] General Johnson, as NRA Administrator, approved the Code and on November 3, 1933 transmitted it to the President for signature.[18]

The President affixed his signature on November 27 and the Code became effective December 5, 1933. The Contact Committee distributed copies of the Code to all members of the industry and was discharged on December 7.[19]

[14a] Com. Ex. 836-2 V.

[15] Reiter, General Manager, the Institute (C) Tr. 16978-80.

[16] Com. Ex. 612 A-E: Trustees' Meeting, 10/25/33.

[17] Com. Ex. 613 A-C: Trustees' Meeting, 10/26/33.

[18] Com. Ex. 557, p. 327.

[19] Resp. Ex. 1822: Undated letter, Contact Committee to members. Com. Ex. 616 A-D: Trustees' Meeting, 12/7/37.

Summarizing the manner in which the Code was drafted, the witness Porter, President of North American, testified:

> "Well, the board of trustees, either by itself, or through committees, and with the aid of Government officials, drafted the provisions of the Code; but those drafts were all taken back to meetings—to industry meetings, at which they were thoroughly discussed, and the board of trustees were given instructions as to how to proceed from there on."[20]

PROVISIONS OF THE CODE OF FAIR COMPETITION FOR THE CEMENT INDUSTRY AS APPROVED NOVEMBER 27, 1933, BY PRESIDENT ROOSEVELT[21]

ARTICLE I

PURPOSE

To effectuate the policies of Title I of the National Industrial Recovery Act, the following provisions are submitted as a Code of Fair Competition for the Portland Cement Industry, and upon approval by the President shall be the standard of fair competition for such industry, and shall be binding upon every member thereof.

ARTICLE II

DEFINITIONS

1. The term "Portland Cement Industry" as used herein includes the manufacture and sale by manufacturers of Portland Cement.

2. The term "employee" as used herein includes anyone engaged in the Portland Cement Industry, in any capacity, receiving compensation for his services, irres-

[20] (R) Tr. 33914.

[21] Com. Ex. 557.

pective of the nature or method of payments of such compensation.

3. The term "employer" includes any enterprise by whom any such employee is compensated or employed.

4. The term "member of the industry" as used herein includes any enterprise engaged in the industry as above defined.

5. The term "district" as used herein means the geographical producing district as now or hereafter designated by the United States Bureau of Mines or other Governmental Agency, or as may hereafter be determined by the Code Authority.

6. The term "productive capacity" as used herein shall mean the productive capacity of the industry as determined by the United States Bureau of Mines.

7. The term "Institute" as used herein shall mean The Cement Institute.

8. The term "Board" as used herein shall mean the Board of Trustees of The Cement Institute.

9. The term "plant" as used herein shall mean a Portland Cement Manufacturing Plant.

10. The terms "President" and "Act" and "Administrator" as used herein, shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of said Act.

Article III is devoted to the subject of labor.

ARTICLE IV

Administration

To effectuate further the policy of the Act a Code Authority is hereby constituted to cooperate with the Administrator in the administration of this Code.

A. *Organization and Constitution of the Code Authority*—The Code Authority shall consist of seven individuals, or such other larger number as may be approved from time to time by the Administrator, to be selected as hereinafter set forth. The President, in his discretion, may appoint not more than three additional members without vote to represent the Administrator.

1. The Board shall elect the Code Authority. The persons so elected shall, subject to changes at any time by the Board, serve on such Code Authority for such term as the Board shall determine.

The Board shall be made up as follows:

(a) One member to be chosen from each district.

(b) Trustees at Large, not to exceed seven (7) in number, shall be chosen by those members of the Board who represent the cement districts.

(c) The President, the Vice Presidents, and the Treasurer of the Institute shall be ex-officio members of the Board with full power to vote.

The members of the Board to represent the cement districts shall be elected by the members of the industry who participate in the activities of the Code Authority, as provided in Section B, subsection 8 below, in the respective districts by a majority vote of such members in each such district to serve for the term of one year and until their successors are elected and have qualified, and the members of the Board, so elected, shall elect the Trustees at Large; provided, however, that any member of the Board elected to represent any cement district may be recalled by a majority vote of the members of the industry in any such cement district in the event of the change in status of such Trustee or if, for any other reason, any such Trustee is not considered to be representative of the members of the industry in such district and, in the event of such recall, such members shall elect, by a majority vote, a Trustee

to fill the unexpired term of the Trustee who has been recalled; a majority of the members of the Board shall have like power with respect to any Trustee at Large.

In the event of a vacancy in the Board, such vacancy shall be filled for the unexpired term of the Trustee whose vacancy is to be filled in the same manner as such Trustee was elected a member of the Board.

In the event of the inability of any Trustee elected to represent a cement district, or of any Trustee at Large to attend any meeting of the Board or of the Institute or of any committee or committees thereof, the members of the industry in such district, with respect to Trustees representing cement districts and the other Trustees at Large, with respect to any such Trustee at Large, shall have the right, from time to time as the occasion may require, to elect an Alternate Trustee to attend any such meeting or meetings who shall have such authority to represent the members of such district or to act as Trustee at Large as may be prescribed by such members or by such other Trustees at Large. Within the limits of the authority conferred upon him, as herein provided, any such Alternate Trustee shall have the right to vote and to act in all respects in the place of the member of the Board whose place he fills.

2. The Institute or its successors or any trade or industrial association participating in the selection or activities of the Code Authority, shall:

(1) Impose no inequitable restrictions on membership;

(2) Submit to the Administrator, true copies of its Articles of Associatoin, By-Laws, Regulations, and any amendments when made thereto, together with any other information relating to membership, organization, and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

(3) In order that the Code Authority shall at all times be truly representative of the industry, and in other respects comply with the provisions of the Act, the Administrator shall provide such hearings as he may deem proper; thereafter if he shall find that the Code Authority is not truly representative, or does not in other respects comply with the provisions of the Act, he may require an appropriate modification in the method of selection of the Code Authority.

B. *Powers and Duties of the Code Authority*—In addition to the powers and duties herein specifically conferred upon the Code Authority, it shall have the following duties and powers to the extent permitted by the Act and subject to the right of the Administrator by review to disapprove or modify any action taken by the Code Authority pursuant to this Code.

1. The Code Authority shall be the general planning, coordinating, and administering agency of this Code. It may make such rules and regulations as may be necessary for the conduct of its business in the administration of this Code.

2. The Code Authority may designate the Institute or such other committees or agents, and may delegate to them such of its powers as it may deem necessary for the administration of this Code; provided, however, that the Code Authority shall not be relieved of final responsibility with respect to any such delegated powers.

3. The Code Authority shall, upon complaint of interested parties, upon request of the Administrator, or upon its own initiative, make such inquiry and investigation as to the operation and observance of this Code as may be necessary and report the results thereof to the Administrator for such action by him as may be in accordance with law.

4. No member of the Code Authority or of any committee designated by it shall participate as such member in a proceeding in which he is interested, either as complainant or as respondent, or in which he is in any other manner directly interested; and in the event of any such disqualification, the remaining members of such Code Authority or committee shall certify such disqualification, together with the reasons therefor, to the President of the Institute, who shall promptly designate a person to sit as a special member of such Code Authority or committee for the purposes of any such proceedings; provided, however, that any such special member so appointed shall be selected from the same group of the industry as is represented by the member whom he replaces.

5. In order that the President may be informed of the extent of the observance of the provisions of this Code and of the extent to which the declared policies of the National Industrial Recovery Act are being effectuated in the industry, the Code Authority and members of the industry shall make such reports as the Administrator may require periodically or as often as he may direct. Each member of the industry shall make such sworn or unsworn reports to the Code Authority or to such agency as it may designate as to wages, hours of labor, number of employees, and such other matters as the Code Authority may require for the administration of this Code; provided, however, that any information furnished hereunder of a confidential nature as between competitors in the industry shall not be available to competitors nor published in such form as shall reveal the identity of any member of the industry furnishing such reports.

In addition to the information required to be submitted to the Code Authority, there shall be furnished to governmental agencies, such statistical information as the Administrator may deem necessary for the purposes recited in Section 3(*a*) of the Act.

6. Any interested party shall have the right to complain to the Code Authority under such rules and regulations as it may prescribe in respect of any rule, regulation, order or finding made or course of action pursued by the Code Authority, and any interested party shall have the right to appeal to the Administrator under such rules and regulations as he may prescribe in respect to any decision, rule, regulation or course of action of the Code Authority, pursuant to any provision of this Code.

7. The Code Authority and/or the Board may, from time to time, make such recommendations to the President as it may deem advisable or necessary to effectuate the policy of the Act and to develop and maintain conditions of fair competition in the Industry; and any modification or additions to this Code recommended by the Code Authority and/or the Board shall, upon approval by the President, become part of and shall have the same force and effect as other provisions of this Code.

8. Any member of the Industry shall be entitled to participate in and share the benefits of the activities of the Code Authority, and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and by either paying his reasonable share of the expenses of its administration or by becoming a member of the Institute. The reasonable share of expenses of administration shall be determined by the Code Authority subject to review by the Administrator on the basis of volume of business and/or such other factors as may be deemed equitable to be taken into consideration.

ARTICLE V

Safety Work (Omitted)

ARTICLE VI

Plan for Sharing Available Business

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2126.

ARTICLE VII

Increase in Productive Capacity

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2151.

ARTICLE VIII

Cost Protection

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2124.

ARTICLE IX

Open Price—Market Stabilization

This article is dealt with in relation to the subject matter thereof, Part III, *supra*.

ARTICLE X

Unfair Competition

For the purposes of this Code, the following acts shall constitute unfair trade practices and a violation of this Code:

1. Making or promising any bribe, gratuity, gift, or other remuneration, not filed and published in accordance with Article IX hereof, directly or indirectly to any purchaser or prospective purchaser, or to any officer, employee, or representative thereof,

for the purpose or with the effect of making a sale of cement; imitating any brand or trademark used by any competitor; inducing or attempting to induce in any manner the violation of any existing future sales order or future sales contract, or other existing contract between a member of the industry and his customer, with the purpose or effect of inducing or causing a breach of any such contract; circulating or disseminating false or misleading information by words or acts relative to the prices, credit standing, business integrity, or ability to perform contracts, of any competitor or the grade, quality, count, character, nature, origin, manufacture, weight, or preparation of his products.

2. To compensate salesmen in any manner other than upon a fixed salary and full-time basis.

[Italicized part quoted in Fdgs. Par. Twelve (b)]

3. *To divert or permit purchasers or users of cement to divert shipments of cement from one destination to another destination, the result of which will enable the purchaser or user to secure cement at less than the member of the industry's published market price at the point of final destination.*

4. The following practices, undertaken for the purpose or with the effect, directly or indirectly, of furthering the sale or use of a particular brand of cement shall constitute unfair trade practices and a violation of this Code:

(a) Except with permission of the Code Authority (and such permission, when given, shall apply to all companies in the marketing area affected) the purchase, by any member of the industry, of bonds, or other securities, issued for the financing of constructive work, either in the name of the member of the industry, its subsidiaries, or of individuals, or officers, connected therewith, or the acceptance of such bonds, or other securities, in payment, wholly or in part, for cement, or the advance, loan, or payment of any monies by a member of the industry for the purpose of inducing the purchase of cement, or to assume cost of Bidders' Bonds or to endorse or guarantee or in any way relieve a Bidder of the

responsibility for or the expense of providing such bonds, unless such conditions shall have been filed and published in accordance with Article IX.

(b) For the purpose or with the effect of evading the provisions of Article IX of this Code, the purchase of fuel or other supplies, either directly or indirectly, or in the name of the company, or its subsidiaries, or of individuals, or officers connected therewith at prices above the market price thereof at the time of purchase.

(c) To make or permit to be made, either directly or indirectly, any secret payment or allowance of rebates, refunds, commissions, credits, or unearned discounts in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers on like terms and conditions.

(d) The prepayment of transportation charges on shipments consigned to other than the member of the industry itself, except in the case of railroad freight charges to stations to which regulations require prepayment from any shipping point, or the payment of demurrage charges by any member of the industry on such shipments; provided, however, that the foregoing provision, except as to demurrage charges, shall not apply to shipments purchased directly by and consigned to departments of the United States or State Governments, unless such conditions shall have been filed and published in accordance with Article IX.

(e) Knowingly diverting or permitting to be diverted to other uses, cement shipped for a specific work project nor knowingly shipping on a specific work order or contract, an amount of cement in excess of the actual needs of such work.

(f) To entice maliciously the employees of a competitor with the intent or effect of interfering with the conduct of the business of such competitor.

(g) Knowingly to ship cement by any transportation agency which, for the purpose or with the effect of inducing or influencing the sale or purchase

of cement, makes payments or concessions by rebates or otherwise.

(h) The payment, or offer to pay, directly or indirectly, any advertising expenses of purchasers or users of cement.

(i) Lavish, excessive, or undignified entertainment of purchasers or users of cement, or others connected therewith; donating funds, or providing banquets or other similar lavish entertainment for purchasers or users, or associations thereof; giving or offering to give premiums, personal gifts, gifts of cement, or gifts of any other commodity of substantial value to purchasers or users of cement.

(j) The sale by any member of the industry, directly or indirectly, of any commodity at a discriminatory price.

(k) Services to purchasers or users are proper under fair competition, if confined within the limits of advice and consultation. The furnishing of articles or facilities of a definite physical nature, whether by way of loan, lease, gift, or otherwise, resulting in monetary benefit to purchasers or users is discriminatory and shall constitute unfair competition.

(l) No member of the industry shall maliciously refuse to sell to, or maliciously interfere with the business of, dealers or users of portland cement purchased from a competitor, for the purpose of interfering with the conduct of the business of such competitor.

ARTICLE XI

Method of Selling and Marketing Cement

This Article is dealt with in relation to the subject matter thereof, *infra*, Part XIV, Secs. B and C.

ARTICLE XII

Terms and Conditions of Sale

This Article is dealt with in relation to the subject matter thereof, Part XV, *infra*.

ARTICLE XIII

Standardization of Products

This Article is dealt with in relation to the subject matter thereof, Part I, *supra*, pp. 25-26.

ARTICLE XIV

It is the concensus of opinion of the industry that each member thereof should bear his proportionate share of the burden of the cost of constructive cooperative activities approved and supported by the majority of the Industry and whose benefits are common to all manufacturers.

ARTICLE XV

Nothing in this Code contained, excepting, however, the provisions of Article III, shall be deemed to apply to or affect the sale by any member of the industry of any products of the industry for direct shipment in export trade.

ARTICLE XVI

Modification

1. This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provisions of subsection (b) of Section 10 of NIRA from time to time to cancel or modify any order,

approval, license, rule or regulation issued under Title I of said Act and specifically but without limitation to the right of the President to cancel or modify his approval of any provision of this Code or any conditions imposed by him upon his approval thereof.

2. Whenever the Administrator shall determine such action by him to be necessary to effectuate the policy of the Act, he may modify or cancel any action pursuant to this Code by any agency established thereunder.

3. Except as to the provisions required by the Act, this Code may be modified on the basis of experience or changes in circumstances, such modifications to be based upon application to the Administrator, on such notice and hearing as he shall specify and to become effective on approval by the President.

ARTICLE XVII

Monopolies

No provision of this Code shall be so construed or applied as to permit or promote monopoly or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

ARTICLE XVIII

Effective Date

The effective date of the Code shall be ten days after approval thereof by the President.

The Suspension of Article XI

Shortly after the approval of the Code, objection to Article XI of the Code dealing with the classification of purchasers was made by a number of dealers and dealer organizations. A hearing was held thereon and part of this

Article relating to the classification of purchases was ordered suspended.[22] In explaining the action taken, Reiter, who at the time was Secretary of the Code Authority, testified:

> "There are 90 cement manufacturers in the United States, and there are 30,000 dealers. And they had a lot more influence than we did. And the Administrator after this hearing just ordered that it be suspended."[23]
>
> • • •
>
> "Yes, they thought at that time that they could do a better job of selling State governments than we could, although that was another thing.
>
> To make this plain, Mr. Wooden, there was a long period of discussion between the dealers' code authority and the cement code authority.
>
> Their original position, which seemed to me to be that they wanted to handle all of the cement sold, gradually was changed, so finally they seemed to be about willing to take, or accept a marketing practice as was originally specified by Article 11. By that time May 27, 1935, had arrived."[24]

AMENDED CODE OF MAY 21, 1935

The minutes of the meeting of the Code Authority on May 14-15, 1934 record:

> "There was read a draft of a proposed amended Article XI prepared by Mr. Sunderland from suggestions received by the Code Authority from members and groups of this Industry and from a Committee of the Builders Supply Industry. During the reading of this draft many comments and suggestions for changes were made, and at the conclusion of such reading the Chairman was instructed to proceed with the preparation of a completed draft of Article XI."[25]

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[22] Reiter (C) Tr. 4264, *infra*, p.

[23] Reiter (C) Tr. 4266.

[24] Reiter (C) Tr. 4267. See also *infra*, p.

[25] Com. Ex. 559 C: Code Minutes, 5/14-15/34.

Apparently as a result of this activity, the NRA Code Administration called a meeting on July 11, 1934, and gave public notice thereof, inviting all who wished to be present to discuss revisions of the cement code. The Code Authority appeared and presented a statement.[26] The matter continued under discussion until April 1935. A revision entitled "Amendment to Code of Fair Competition for the Cement Industry as Approved of May 11, 1935"[27] became effective as of May 21, 1935, six days before the *Schechter* decision.

The provisions of this revision elaborated the Article dealing with labor, extending it to three separate Articles. The provisions as to the Code Authority were elaborated but not essentially changed. Members, however, were required to keep accurate and complete records of transactions to show compliance with the provisions of the Code and furnish accurate reports when required by the Code Authority or the NRA.

A provision was introduced under which any member of the Industry might agree with any other member of the Industry that in case one was aggrieved by any violation of the Code on the part of the other, the matter should be settled by the payment of liquidated damages, provided that such agreement should be effective only after submission to, and consent of, the NRA.

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

A provision was introduced requiring members of the Industry to file with an agent of the Code Authority "copy of every contract or order by which he sells or undertakes to sell products of the industry," and, [*"Upon receipt of such filed orders or contracts the agent of the Code Authority shall send digests thereof to all interested members of the Industry."*][28]

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[26] Com. Ex. 598 G-L: Members' Minutes, 7/10/34.

[27] Com. Ex. 560.

[28] Com. Ex. 560, p. 15.

The Articles as to a plan for sharing available business, filing petitions objecting to construction of new plants and selling below cost were omitted, as well as that part of the Article previously cancelled dealing with the distinction between different classes of purchasers and those who are to be sold direct and those who are to be sold through dealers.

The Articles as to trade practices and methods of selling and marketing cement, terms and conditions of sale, and standardization of products, were maintained in substance, although the language was altered and the provisions were elaborated, and, in many cases, more detailed.

Since, however, this Revised Code was in effect for only six days, consideration of its terms and the method of its enforcement were not subjects of testimony.

B. The Code Authority and The Cement Institute.

The Code Authority was established by Article IV of the Code to be composed of seven persons appointed by the Trustees of the Institute, charged with the duty of planning for the industry and insuring the equitable administration of, and compliance with, the Code of Fair Competition, as approved by the President.[1]

Pursuant to this authority, the Trustees, at their meeting of December 7, 1933,[2] elected B. H. Rader as Chairman, R. B. Henderson, C. L. Hogan, J. B. John, G. F. Coffin, M. C. Monday, and L. T. Sunderland[3] to compose the Code Authority.

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[1] Com. Ex. 557, pp. 330-333.

[2] Com. Ex. 616 A-D: Trustees' Meeting, December 7, 1933.

[3] Of this original Code Authority, all were at the time of their election Institute Trustees. Lucas, who replaced Henderson, was not a Trustee, but Neylan, who replaced Hogan, was a Trustee.

On February 21, 1934, Henderson resigned because of ill health and was replaced by E. P. Lucas,[4] and on July 10, 1934, J. F. Neylan was elected to serve in place of C. L. Hogan during the latter's absence.[5]

On November 20, 1934, a new Code Authority, composed of G. H. Reiter, Chairman, G. E. Warren, F. M. Coogan, E. P. Lucas, J. F. Neylan, L. T. Sunderland, and S. W. Storey, were elected.[6]

The relation between the Code Authority and the Institute was established by the Code itself and amplified by regulations issued by the National Recovery Administration. The NRA, on May 29, 1934, issued a clarification of the relation between Code Authorities and Trade Associations, stating, among other things:

> "A Code Authority is an entity, separate and distinct from a Trade Association and its governing body, even though, so far as industry representation thereon is concerned, may have the same personnel.
>
> • • • The most effective Code Authorities make the greatest use of the available facilities of their Trade Associations, though not duplicating facilities for necessary services (such as, statistics, accounting, investigation, publication, standards, grades, etc. etc.) where they are available in the records of the Trade Associations.
>
> Provisions may be made in the By-Laws of the Code Authority for the utilization of the facilities and personnel of a Trade Association, and the Code Authority may pay for the cost of using such facilities for Code activities.
>
> In any such case the Trade Association should be under such regulations and subject to such super-

[4] Com. Ex. 618 A-H: Trustees' Meeting, February 21, 1934.

[5] Com. Ex. 598 A: Secretary to Members, dated July 12, 1934.

[6] Resp. Ex. 1823 B: Trustees' Meeting, November 20, 1934. Of the second Code Authority only Storey and Lucas were Trustees.

vision as to insure fair and effective Code Administration, and avoid discrimination and the appearance of discrimination against non-members of the Association.

The Secretary of a Trade Association may also be the Secretary of the Code Authority providing he is able to do so without inconvenience. His duties are separate and distinct and should be kept so. In carrying out his functions as Secretary of the Code Authority he is solely responsible to the Code Authority. In functioning as an Association Secretary he is solely responsible to the Association. A paid employee or organization under the Code Authority or of a Trade Association, may be designated as the Statistical Agency for the Code Authority if the Code Authority takes the necessary steps to insure his impartiality.

Code Authorities may not use funds collected from members for the promotion of the Industry. Such monies raised as contributions of the Code Authorities are to be expended solely in the administering of the Code * * *."[7]

Reiter, Secretary of the Chicago Division, when the Code went into effect, and also Secretary and later Chairman of the Code Authority, testified that the expenses of the Code Authority and of the Chicago Division of the Institute were very carefully separated. Office rental, expenses and all salaries (including his own) were prorated. Code Authority expenses were met by an assessment upon all members of the industry approved by NRA.[8]

Examined as to the difference between the activity of the Code Authority and the Institute, Reiter testified:

"Q. What were the things which the Institute was doing during that period that the Code Authority was not doing? A. Bearing in mind that this was a division office of the Institute, it handled the filing

[7] Resp. Ex. 170 A-B.

[8] (C) Tr. 2801-02.

and checking and dissemination of contract information. Do you want me to describe that in detail?

Q. No, just cover the various activities or functions which the Institute was performing at that time. A. That activity required most of the work of the Institute office itself and occasioned most of its costs. Another principal activity was the issuance and servicing of freight rate books in a certain area of the country, there being another freight rate bureau in another part of the country, which handled part of that work.

Q. The price filings, so-called, were a code authority activity, were they not? A. Yes, sir.'"[9]

And again:

"Q. Mr. Reiter, were there any activities of the Cement Institute which were temporarily discontinued by it during the code period and which were assumed during that period by the Code Authority? A. I am sure there were not.

Q. Had the Cement Institute any system of filing prices before the time of the Code? A. No.

Q. What new functions or activities, then, did the Code Authority assume that had not been previously carried on by the Institute? A. Well, the Code Authority was, of course, the administering body for the Code and they worked at that job. They did follow a lot of activities which were not related at all to those of the Cement Institute.

Q. Did the Cement Institute have a code of ethics? A. Yes.

Q. Prior to the time of the NRA Code? A. Yes.

Q. Were some of the provisions of the code of ethics included in the NRA Code? A. I cannot answer that, Mr. Wooden. I do not know.

Q. If that should be the case, then the Code Authority would be administering some things which the Institute previously had had in its code of ethics to handle? A. I do not know how to answer that question.

[9] (C) Tr. 2803-04.

Q. It all depends on whether the NRA Code included provisions of the former Institute code, does it not? A. If the Code, as approved by the NRA, was identical with the code which was adopted by the Institute back in 1929 and if the Cement Institute attempted to administer that former code, none of which is a fact, then it would be true. (Laughter)."[10]

Upon the termination of the Code, the trustees passed a resolution instructing the Treasurer to defray the expenses incurred for Code purposes on or before May 27, 1935 out of Code funds[11] and subsequently the Secretary of the Institute sent to all members an accounting of the Code Authority income and expenses from December 7, 1933 to June 16, 1935.[12]

C. NRA Code Activities.

Introduction

The Code placed certain duties upon, and authorized certain activities by, the Code Authority and authorized other activities by the Institute beyond those incident to its purposes as declared in its Articles.

In this section, following evidence as to enforcement of the Code, the evidence is digested as to activities of the Code Authority under Article VIII of the Code—Cost Accounting—and as to activities of the Institute authorized under Articles VI and VII of the Code—Plan for Sharing Available Business and Opposition to New Plants.

Code Authority activities under Article IX of the Code dealing with open price filing are covered in Part III, *supra*, and activities under Article XI dealing with the method of selling and marketing cement are covered in Part XIV, *infra*, Secs. B and C.

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[10] (C) Tr. 2815-16.

[11] Resp. Ex. 172 B.

[12] Resp. Ex. 173 A, B.

These activities were closely examined by Counsel for the Commission, apparently to disclose the "state of mind"[1] of the respondents in accordance with his theory that the Code Authority was the "creature and tool"[2] of the Institute, and his supposition that what the industry was invited, allowed or ordered to do under NRA was what its members desire and strive to do today.

1. Enforcement of the Code

During the effective period of the Code, the Code Authority received specific complaints against various members of the industry. These were investigated and reported in accordance with the duty imposed upon the Code Authority by Article IV B 3, *supra*, p. 2107, and the regulations relating thereto promulgated by the Administrator in a general bulletin to Code Authorities issued in January 1934.[1]

It was the Code Authority's practice to handle these almost entirely through correspondence. If upon investigation it reached the conclusion that a violation of the Code had occurred, it then referred the entire file to the NRA Compliance Division for such action as that agency cared to take.[2]

Evidence relative to the Code Authority's handling of complaints and violations in connection with open price filing under the Code is set forth under Part III, F, *supra*.[3]

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[1] (R) Tr. 37192-93.

[2] (C) Tr. 3173.

[1] Resp. Ex. 182: NRA Bulletin No. 7, "Manual for Adjustment of Complaints".
Reiter, Chairman, Cement Code Authority (C), Tr. 17044-49.

[2] Reiter, *supra*, Tr. 17044-45.

[3] Resp. Ex. 183: Code Authority Bulletin No. 1.
Reiter, Chairman, Cement Code Auth. (C) Tr. 17044-49.

At a meeting of the Code Authority on May 14-15, 1934 in San Francisco,[4] the Authority had before it a telegram stating that General Johnson had requested an expression from the Code Authority as to the constructive gains accomplished through cooperation under the Code. Upon motion made and unanimously carried, the Code Authority replied:

> "Operation our Code has been disappointing to members of our Industry for reason that NRA has not cooperated with Code Authority in enforcement and prosecution of violators upon information developed by our investigations. If NRA will require observance our Code by prosecution of violators results will be beneficial to employees, public and members this Industry."

2. Cost Accounting

Article VIII of the Code provided:

> "1. It shall be an unfair method of competition for any member of the industry to sell or offer to sell cement at less than his expenses of manufacture, provided, however, that any member of the industry may sell or offer to sell cement at below his own expenses to meet the competition of any other member of the industry whose price is not less than the expenses of manufacturing of such other member."

The Article follows with a method of determining the per unit manufacturing expense to be used as a criterion by every member of the industry. It then provides for the investigation and report upon the accounting of any member who is complained of as selling in violation of the Article. The final paragraph of the Article provides:

> "3. *Uniform Cost Accounting.*—The Code Authority shall prepare and adopt for general use throughout the industry, and submit to the Adminis-

[4] Com. Ex. 559 A-C.

> trator for approval within thirty (30) days of the effective date hereof, a standard method or system of uniform cost accounting which shall specify all items and include all elements of manufacturers cost. When so prepared, adopted, and approved, all members of the industry shall apply the principles and include all the elements thereof in determining their respective costs."[1]

In anticipation of this provision the Trustees of the Institute had submitted a manual of uniform cost accounting to the Code Authority in December 1933. It developed that this manual was not satisfactory to all members of the industry and the Code Authority directed its Chairman to appoint a committee of auditors from the industry, to suggest modification of the manual and submit their report to the Code Authority.[2] The committee so appointed prepared a revised manual. The Code Authority approved the manual and secured the approval thereof by the NRA Administrator. The introduction to this manual states:

> "In compliance with the requirements of Article 8, Section 3 of the Code of Fair Competition for the Cement Industry the Code Authority has prepared, adopted and presents for general use throughout the industry, a Standard System of Accounting which specifies all items and includes all elements of manufacturers' costs."[3]

The book thus introduced was distributed to all members of the industry, to many outside the industry and to certain officers of the NRA.[4]

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[1] Com. Ex. 557.

[2] Com. Ex. 629 A-C.

[3] Resp. Ex. 184: Manual of Accounting for the Cement Industry—1934.

[4] Reiter, Chairman, Cement Code Auth. (C) Tr. 17054.

Reiter testified that the Code provision against sales below cost was not enforced.[5]

The company representatives who testified in answer to questions as to whether they used this manual said that they did not.[6]

3. Plan for Sharing Available Business

The first draft of the Code included authority for the development and use of a plan for sharing available business.[1] This was the subject of a great deal of discussion and criticism during the Code drafting period from June to October, 1933. Northern California companies felt that special consideration must be provided for Pacific coast problems in any plan for production control.[2] District meetings developed distinctive ideas of their own.[3] Pittsburgh criticised proposals for determining the percentages as unfair to more modern and up-to-date plants.[4] Marquette claimed that such a plan would be contrary to public policy, impractical, unfair and arbitrary.[5] Aetna expressed the opinion that smaller companies could not expect much altruism from larger companies on the matter of curtailment. It expressed the fear that the dormant capacities

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[5] Reiter, Chairman, Cement Code Authority (C) Tr. 17054.

[6] Southwestern: Warren, G. E., Vice President (R) Tr. 29208-10.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36509.
Missouri: Alexander, President (R) Tr. 37165.
Hawkeye: Manley, General Manager (R) Tr. 41817.

[1] Com. Ex. 556.

[2] Com. Ex's. 1227-1230: Circular letter with enclosures from McCarthy, dated 6/22/33.

[3] Com. Ex. 637 A-F: District Meeting Minutes, 6/22/33.
Com. Ex. 828-6 T-7 H: District Meeting Minutes, 6/23/33.

[4] Com. Ex. 821-3 Y-3 Z: Letter dated 6/23/33, Galt, Vice President, Pittsburgh to Coffin, Vice President, Nazareth.

[5] Com. Ex. 2603 A-F: Marquette letter, dated 8/9/33.

of big mills would work to the disadvantage of small companies and that the plan tended to develop monopoly.[6]

Young, President of Lehigh, in a letter dated August 30, 1933 to Coffin, President of the Institute, while the discussion of the Code was still in progress, set forth the necessity for a plan for stabilizing production as part of any plan undertaken for the stabilization of prices and the payment of better wages and the employment of more people during the depression. The letter said:

> "Before attempting to answer your recent request for a personal opinion as to why the article on 'Control of Production and Distribution' is an essential part of the Cement Code, I should like to preface my remarks by reiterating that, in my opinion, price control is more essential to market stabilization than control of production. As between curtailment and price observance I would always choose price observance. Although I am convinced that a quota system will not in and of itself stabilize the market, I am quite willing to admit that, if there is absolute price control, some method of equitable distribution must be developed to insure proper protection for the weak.
>
> Industry has been requested by the Federal Government to cooperate in a nation-wide campaign against depression. The important objective is the re-employment of millions of men now out of work. The increase in employment is to be brought about by shorter hours of labor. In order to provide proper compensation for the shorter period of work, higher wage rates per hour have been proposed. Higher wage rates materially increase the cost of production. To offset increased cost of production there must be commensurate increase in price. An increase in

[6] Com. Ex. 86 A-C: Letter dated 8/17/33, Cree, Sales Manager, Aetna to Johnson, President, Aetna.
Com. Ex. 87: Aetna memorandum "Referring to the Plan for Sharing Available Business."

price cannot be of benefit unless safeguards are set up to insure its maintenance.

* * *

To summarize, the cement industry in order to cooperate with the NRA must have price stabilization. The weaker companies will not yield what has long been considered an inherent right to cut the price without receiving some consideration in return. The price they set on stabilization is control of distribution."[7]

Article VI of the Code as adopted provided:

"The Board (of the Institute) is hereby authorized to formulate a plan or plans * * * for the equitable allocation of available business among all members of the industry or among members of the industry operating in one or more Districts, and for the control of cement inventory and to submit the same either to a meeting of all members of the industry or to meetings of members in the Districts affected, as the Board may determine, for approval, modification or rejection. Each member of the industry shall be entitled to receive notice of any such plan and to participate in any meeting or meetings of all members of the industry or of members in the District in which such member operates and, further, shall have the right to appear before the Board at any meeting at which any such plan is being considered for the purpose of presenting any facts or arguments relative thereto.

When any such plan shall have been formulated by the Board, the Code Authority shall present the same to the Administrator for consideration and the Code Authority shall represent the industry and the Board in conference with the Administrator with respect to any such plan; provided, however, that as regards any such plan the Code Authority shall have only such power to bind the industry or any subdivision thereof as shall have been conferred upon it by majority vote of the industry or of any subdivision thereof, and each member shall have the right to present his objections, if any, to the Ad-

[7] Com. Ex. 836-2 X-Y.

ministrator. The Code Authority shall collect and present to the Administrator such data and statistics as may be required in connection with any such plan together with a statement of the names of those members of the industry that approve and of those that disapprove such plan in whole or in part.

Any such plan shall be based on the following principles:

(a) It shall be fair and its benefits shall be equitably apportioned to all plants.

(b) It shall give due consideration to all pertinent factors including demonstrated productive capacity based on the clinker and/or cement production performance of non-obsolete plants and equipment.

(c) It shall in no way reduce the total production of all plants below what is necessary amply to supply demand.

(d) It shall not promote monoply or monopolistic practices or oppress small enterprises."

The Article provided that such plan should become operative only upon the approval of the NRA Administrator after hearings at which the Code Authority should represent the industry and providing that any member of the industry might be heard at such hearing.[8]

THE COFFIN COMMITTEE PLAN

In anticipation of the approval of the Code, the Trustees on October 26, 1933, directed Mr. Coffin to act as chairman of a committee of five, four other members to be selected by himself, for the study of a plan for sharing business and report to the Board.[9] Mr. Storey reported to the Trustees

[8] Com. Ex. 557, Article VI.

[9] Com. Ex. 613 B: Trustees' Minutes, 10/26/33.
Coffin appointed, C. L. Hogan, C. B. Condon, A. B. Henderson, and S. W. Storey as the other committee members (Com. Ex. 615 E).

at their meeting[10] on December 5, 1933 that this committee recommended the application of the following general principles to a plan for sharing available business, namely:

> 1. "That any plan should be predicated upon the principle that all clinker production allocated to each separate plant must actually be produced at that plant only.
>
> 2. That the productive capacity of each plant be determined by applying the Bureau of Mines formula to clinker production; namely, using the highest consecutive three months' clinker production reduced to a daily average and multiplied by 365 days, during any period of time from January 1, 1927 to January 1, 1933.[10a]
>
> 3. That the distribution of each plant's capacity shall be based on its own average annual shipments into the district or districts to which shipments have been made during the same six years, namely, January 1, 1927 to January 1, 1933.
>
> 4. That each plant's percentage of shipments be proportionate to the ratio of that plant's capacity to the total capacity of the district or districts against which its capacity is changed."

At the Trustees' meeting two days later, on December 7, the Chairman asked if they were ready to vote on the plan. The question precipitated discussion resulting in a motion to reorganize the committee by substituting new members for those who had been elected to the Code Authority.[11]

Article VI of the Code, as quoted above, declared that any plan should give due consideration to "demonstrated productive capacity based on the clinker and/or cement pro-

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[10] Com. Ex. 615 C-E: Trustees' Minutes, 12/5/33.

[10a] Mallory, the Institute's Statistician, testified that he originated the idea of a capacity formula based on the three highest consecutive months of actual clinker production (C) Tr. 17393-94.

[11] Com. Ex. 616 C-D: Trustees' Meeting, 12/7/33.

duction performance." W. S. Mallory, the Institute's statistician, advocated clinker production as the yardstick.

Writing to Porter, President of North American, on October 11, 1933, Mallory said:

> "I fully realize that using the existing clinker capacity of each plant as the yardstick to measure the production and distribution of cement so that each plant can know its monthly position in relation to the total production and shipments of its district is not entirely fair to all plants now. At the time this plan was suggested, it seemed to be the best plan based on the information then available, but if it is going to be possible, under the code, to obtain more complete and accurate information about the historical records of each plant, I feel certain that a more equitable yardstick can be found."[12]

* * *

In a memorandum dated November 8, 1933 he said:

> "I still believe that the historical clinker production record should be used to establish the estimated capacity of each plant for the reason that, except for a few exceptions which should be adjusted, practically every plant has operated to its full capacity in some three months' period during the past six years.
>
> Some executives think that shipments should be used in whole or part in estimating the plant capacity, but I do not agree with this for, if the shipments from each plant for the past six years were used as a part of plant capacity instead of clinker, it would give an unfair advantage to thirty-three plants. I, therefore, suggest that we use the present method of estimating the plant capacity on clinker alone and that each plant be estimated as a separate unit."[13]

This yardstick appears in par. 2 of the plan, above.

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[12] Com. Ex. 550 P.

[13] Com. Ex. 844 D.

THE STOREY COMMITTEE PLAN

The newly appointed committee, under the chairmanship of Storey, with the assistance of Mallory, proceeded with the preparation of a detailed plan, including the assignment of quotas for each mill in the industry. This, referred to as the Storey (or Mallory) plan; was submitted to the Trustees at their meeting on February 21, 1934.[14] After some amendment they approved the plan on the following day, with direction that it be submitted to the members of the industry.[15] The plan as so submitted was to operate as follows:[16]

> (a) Capacity figures to be arrived at by method recommended by Coffin Committee except that the period ran from January 1, 1925 instead of January 1, 1927. Such capacities to be calculated at the beginning of each calendar year and, once approved by Code Authority, not to be changed during the calendar year except that during 1934, Code Authority might adjust the capacity and quota figures of any mill making a better three-months record up to October 1 than that in which its rating had been based.
>
> (b) Capacity of each mill to be allocated at beginning of year to the various Bureau of Mines Districts into which it had shipped in proportion to its own shipments into such districts during the three preceding calendar years. If mill had not shipped during preceding year, then the capacity was to be allocated in proportion to such mill's shipments into the several districts during the last year that shipments were made from that mill.
>
> (c) Each mill to notify Code Authority within 31 days from effective date of plan or of beginning of calendar year whether or not it was going to op-

[14] Com. Ex. 618 E: Trustees' Meeting, 2/21/34.

[15] Com. Ex. 618 G.

[16] Com. Ex. 2917 A-T.

erate during the current year. If it elects to operate, its quota was to be computed by applying to the consumption of cement in each district the same percentage as that mill's percentage of the total capacity of such districts determined as in (b) above.

(d) Mill electing not to operate was to be entitled to ship only ½ the amount as determined under (c) above from other mills, such mill to reduce its established capacity by 50% and to return to the district or districts to which its capacity had been allocated, the remaining 50% of its capacity.

(e) Mill electing not to operate to be permitted at any time during calendar year to buy not more than the amount of cement to which it is entitled under (d) above from other mills, such sales to be made at price not lower than 10¢ per barrel below the average mill net received by seller during three months prior to date of purchase and cement so sold not to be included in selling mill's quota.

(f) Overshipped operating mill to be permitted at any time during calendar year to buy from undershipped operating mill located in same or adjoining district. Amount so sold and shipped to be included in shipments to which the selling mill was entitled for the year in which sale was made. Price on such sales to be 25¢ per barrel less than average per barrel mill net received during three preceding calendar months by the buyer at the mill for the account of which cement is purchased.

(g) At close of each year, adjustment was to be made by districts of all shipments over and under each mill's pro rata share. Method of adjustment is set out in detail.

(h) If mill ships more than 5% in excess of quota, such overshipments were to be considered a violation of Code subject to penalty of 50% per barrel on all shipments in excess of 105%, payable to the Code Authority and to be used to defray its current expenses.

The plan was considered in district meetings and variously criticized.[17] Individual companies criticized the plan.[18]

Beck, President of Great Lakes, writing on March 1, 1934 to Young, President of Lehigh, stated that the plan proposed was unfair to the companies that had maintained fair practices during the depression, stating:

> "Under the present arrangement, such plants as Standard, West Penn, Marquette, Wabash, Allentown and others, who have been absolutely unfair in the past, are being rewarded for grabbing off business that would have been taken by other people had the price been maintained. Then again, such plants as ours and others will be punished simply because our business ethics were open and aboveboard at all times. I hope you will be able to make the arrangement to give the Great Lakes Portland Cement Corporation an opportunity to establish its real capacity."[19]

Baumberger, Vice President of San Antonio, writing on March 6, 1934 to Conn, President of the Institute, complained of the unfairness of the proposed plan to his company. His letter said:

> "The method of determining the productive capacity of a cement mill as set out in the plan of *sharing available business* for the cement industry,

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[17] Com. Ex. 637 G-J.
Com. Ex. 562-8 L-8 M.
Com. Ex. 562-8 X-8 Y.

[18] Com. Ex. 838 H: Letter dated 3/1/34, from Beck, President, Great Lakes to Young, President, Lehigh.
Com. Ex. 585 E-G: Letter dated 3/8/34, from Baumberger, President, San Antonio to Hogan, President, Lone Star.
Com. Ex. 542 A-B: Letter dated 3/12/34, from Davis, Vice President, Volunteer to Board of Directors, The Institute.
Com. Ex. 426 O-Q: Memorandum dated 3/9/34, from Moyer, President, Vulcanite.

[19] Com. Ex. 838 H.

does not give my Company a fair and equitable pro rata share of the available business.

The majority of the cement plants in the State of Texas established their present pro rata during that period of time when unfair methods of competition were practiced, and this Company then did not think it good business to participate in said methods of selling, preferring to pass up the business. For this reason we did not establish a higher productive capacity at that period of time, so for this, this Company is now being penalized for having been ethical in those times.

The writer talked to the members of the industry in Texas and they are all of the opinion that there should be an upward adjustment in the proration of our mill. I know that the question of productive capacity of each mill is one of contention as many mills can claim that their established productive capacity is less than their actual potential capacity, but it is also a fact that the now established capacity they are operating under is closer to their actual capacity than we are."

He then set forth the percentage of capacity rating allocated by the proposed plan and the revised percentage ratings more favorable to his company and, referring to executives of other companies in his territory, concluded the letter by saying:

"Each of the gentlemen that I spoke to agreed with me that there should be an upward adjustment for our mill along the lines as suggested above and since these gentlemen agree with us, we believe this adjustment should be granted."[20]

Moyer, President of Vulcanite, prepared a memorandum condemning the Storey plan, in the course of which he said, among other things:

"A group of properly regulated free men, banded together against cut-throat competition, and for the

[20] Com. Ex. 585 F-G.

as to discourage consumption, is the kind of a Code we have in mind, and we are very strenuously objecting to injecting this plan for sharing available employment of the largest number of men consistent with the price received, which price is not so high business, into the Code. It favors too much the large chain mills and is a detriment to the small mills, destroying initiative and individuality. Goodwill and reputation, built up by years of successful service, are melted into a mass, and each company becomes a cog in a wheel.

The small companies usually have but one mill, or possibly two mills located in the same district using same price basing point. Whereas the large chain mills have plants in various districts enabling them to ship from a mill having lowest freight rate to the destination involved. During times like the present, when tonnage is so extremely low, the small mill has to reach out beyond the territory paying him the maximum price and meet destination prices figured on other basing points which has the effect of lowering his net mill price to a point which is not profitable.

The plan for sharing available business prohibits him from closing down and leasing or buying from his competitor, as he then becomes a non-operating plant, with prices so fixed that they are prohibitive. So the door is slammed in his face and bridges are burned behind him."[21]

He went on to advocate the opportunity of the small plant to abandon production and to secure cement from some operating plant, and then continued:

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

"What we mean by purchasing or leasing a portion of a cement plant is that we ship our bags to such plant, they manufacture for us and pack the cement in our bags and load it on cars. The mill closed down thus retains brand name and company goodwill.

[21] Com. Ex. 426 O.

> The Vulcanite Portland Cement Company have been operating under this plan for a year, the Hercules Cement Corp., manufacturing for us. The trade have taken very kindly to the idea. We have had nothing but compliments, and *our tonnage has, even from the start, been in accord with the shipments of other plants in this district.*"[22]

Members of the industry convened at Chicago on March 14, 1934 to consider the plan. 73 companies were represented by officers present and 5 by proxies. 13 companies were recorded as absent. The plan was read to the meeting. Representatives of various companies read statements in opposition to the plan. On a motion to strike out all of the plan except the title and to substitute "the accepted report of a committee to be appointed by the Chairman and consisting of three members of the last committee and three members of the group opposed to the plan, these six to elect a seventh member to act as Chairman", the vote was 45 for, and 32 against the motion.[23]

In a letter to Hogan, President of Lone Star, on April 3, 1934, Mallory enclosed a memorandum summarizing the various objections to the plan and stating his answers. His summary of the objections was as follows:

> "Prior to, during, and subsequent to the meeting held in Chicago on March 14th, certain suggestions and criticisms were made in connection with the plan, such as: The total capacity is excessive and not fair. It was established many years ago. Many plants exist only on paper. Will reduce number of salesmen and destroy sales initiative. Overwhelming advantage to chain companies over the individual companies. Quotas should be estimated on all factors instead of only on capacity. Plan gives preference to plants that have over-produced, over plants that have kept orderly pace with the demand. And some other minor objections. Then too some com-

[22] Com. Ex. 426 P.

[23] Com. Ex. 597 A-D.

panies seem to have misunderstood the statistical figures on the large sheets which give the estimates for each district."[24]

Mallory questioned as to the basis of the companies objections to the capacity ratings given to them by Mallory replied that they objected "because companies figured on their potential capacity and my estimates were all made on actual historical production."[25]

Meyer, Vice President of Green Bag, Pa., writing to Affleck as Chairman of the Institute's Committee on Public Relations, stated that in his opinion, harmony within the industry with protection to the smaller companies was very important for the welfare of the industry and, in this connection, he advocated a plan for the allocation of available business and criticized the plan which had been defeated at Chicago as follows:

"This can best be accomplished by a pro-ration plan which meets the necessary requirement of the smaller companies. Last week at Chicago the proponents for the Mallory plan offered nothing in support of it, while the opponents made long arguments. It seemed as though there was an insistence to take that plan or none. Our view of the sentiment indicated only one or two mills opposed to any proration, and we believe this could be limited to one. It was not for the opponents to offer any suggestions when nobody for the plan requested them. We believe that the Mallory plan might appeal to nearly all the smaller companies, if a provision were made that anytime in 1934 a mill could demonstrate its capacity over a three months period, and that all *companies* having a capacity less than one and a half million barrels be given a minimum of fifty per cent of their demonstrated capacity, in order to assure them a livelihood. Those above this rate would prorate with at least fifty per cent of one and a half

[24] Com. Ex. 818-4 C.

[25] (C) Tr. 17231.

million barrels. A pro-ration can be worked out to the satisfaction of the smaller mills, if the chain companies recognize their duty to fairly share with the smaller members of the industry which the NRA particularly requires.'"[26]

On April 11, 1934, Coffin wrote to Mallory, expressing the idea that it was unfortunate that his material was received "in some quarters with a hostile attitude".

"You will remember very early in this game of allocation I said to you that whether rightly or wrongly, the fact remained that a large portion of the industry were antagonistic to the so-called 'Mallory Theory', and that an allocation plan to have any chance of adoption would have to get a different nomenclature.

It has been absolutely impossible to wipe out of the minds of a large number of individual companies the suspicion that the original figures produced were not on the level, and that anything built on those original figures would have to carry all through it the original error, whether intentional or otherwise.

Understand, I am not giving my own personal views on this, but I am giving the view of a large number of individual manufacturers with whom I of necessity came into close contact the last couple years. Naturally, the question arises—if not this what else. My answer to you frankly is 'I don't know'."[27]

Mallory replied that he felt it was a matter which "can be solved easily for my records are available to any representative of the companies" to be checked with the Bureau of Mines or with the companies or figures on capacity ratings, and added:

"This is a matter that can be solved easily for my records are available to any representative of the companies so that they may be checked with the

[26] Com. Ex. 821-4 Y.

[27] Com. Ex. 821 N.

records of the Bureau of Mines or with those of the companies and thus learn whether the capacity ratings are correct. My records for the period from 1925 to July 1931 have been obtained from the Bureau of Mines, which receives its reports from the companies themselves. Since July 1931 I have received reports directly from the companies and all the capacity ratings, therefore, are based on the figures reported by the companies themselves. The rating of every company in the United States is estimated on its three highest consecutive months' actual clinker production as reported by the companies, with no exception.

I feel that, in all fairness to myself, those who have the suspicion you mention should proceed at once to check the capacity ratings and I am ready to cooperate with them at any time or place they may decide.'"[28]

THE BROBSTON COMMITTEE PLAN

After passage of the motion defeating the plan, the Chairman appointed S. W. Storey, B. S. Smith, J. S. Young, members of the old committee, and C. Burnett, F. W. Weibel, and W. A. Davis, members of the group opposed to the plan, as a new committee. These gentlemen were unable to agree upon a Chairman and finally the president of the Institute requested J. Brobston, President of Hercules, to act as chairman and he accepted.[29]

Mr. Brobston's committee held its first meeting on April 12, 1934 and endeavored to find a starting point for development of a new plan. The meeting authorized the Chairman to secure shipping figures for the last five years for each individual mill and thereupon adjourned.[30] Brobston wrote to McKelvey, another member of the committee on April 24th, that after listening to the views expressed

[28] Com. Ex. 821 M.

[29] Brobston, President, Hercules (R) Tr. 26252.

[30] Com. Ex. 636 A: Committee Minutes, 4/12/34.

at this meeting "I came to the conclusion that it would be impossible to harmonize the conflicting views and arrive at any national plan of allocation that would have any chance of being accepted by a substantial majority of the industry."[31] Brobston also advised in this letter that after making rather extended inquiries, it was evidently the desire of a very large majority of the members of the Institute that some plan be reached and he, therefore, had drawn up a method for allocation by districts.

On May 18, 1934, Brobston wrote Conn, President of the Institute, reviewing the difficulties of reaching an agreement with the committee as then organized and submitted his own plan for allocation agreements by districts. The sense of this plan was that the members of each district should determine the percentage of business of their plants in the district that should be allotted to the chain companies and the percentages to be allotted to single plant companies and that the chain companies should agree among themselves as to the division of their percentage allotment and the single plant companies do likewise, leaving each group to determine for itself upon what basis the individual allocations should be made. The allocations so arrived at were to apply to all shipments regardless of destination within or without the district. However, if any shipments from one district into another in any predetermined period should be in excess of 5% above the average for the past 3 years of similar shipments, then on request of the producers in the district into which the excess shipments were made, the Code Authority should conduct an investigation to determine whether the increase had been due to natural development of business or due to the use of an unfair trade practice, and if the latter case the Code Authority should take steps to correct any inequalities discovered. Should the shipments of the chain group, or the single company group in any quarter year

[31] Com. Ex. 808-2 M.

advantages are advanced as a reason for buying a brand in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of the manufacturer's proposition.

It would seem that a logical approach to this problem lies in a careful, thorough and candid scrutiny of our entire marketing system. If we sit around the table and try to analyze the problem and prescribe a remedy for certain ills, both the analysis and the cure will be distorted by tradition and our own experience. Better it is, I think, to learn from the consumer, contractor, dealer, the politician and the well-posted individual, just what our supposed shortcomings are and what they feel we should do to correct them.

I would suggest that a committee made up of younger men in the industry who are familiar with marketing problems and have a knowledge of public relations be designated to conduct this investigation. I would further suggest that the actual contact with the trade and the public be through men not identified with the industry but skilled in making investigations of this type. Such a survey should seek answers to questions of which the following are typical:

(1) Have sales practices been determined in the manufacturer's interest or in the user's?

(2) Do existing sales practices promote the use of cement—assist or retard the Portland Cement Association in the development of new uses and in the expansion of the market?

(3) Is representation of a manufacturer a valuable asset or a necessary evil in the dealer's eyes?

(4) Does manufacturer solicitation create good will with the dealer, the contractor, and large buyers?

(5) What does it cost the manufacturer to sell each of the various classes of buyers? Do sales prices reflect these several costs?

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

After such a survey is made and the report with recommendations distributed, we can then reach a decision based upon facts rather than one based upon hunches."[17]

The Committee issued "A Public Relations Plan for the Cement Institute" dated April 10, 1934.[18] The Plan stated:

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

"1. *To correct misconceptions regarding the practices of the industry held by*

a. Public officials

b. The newspapers

c. The public

d. Other groups

2. *To replace the misconceptions with a favorable attitude on the part of the aforesaid groups.*

* * *

Suggested available themes were:

Concrete for Sanitation
Concrete for Comfort
Concrete for Health
Concrete and Labor
Service with Cement

The chief misconceptions to be removed are these:

1. That uniformity in bids is indicative of collusion
2. That the public would be benefited if prices were quoted f.o.b. mill

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[17] Com. Ex. 553 X-C2.

[18] Com. Ex. 2190 A-J.

3. That cement prices are too high
4. That publicly owned cement plants are desirable or economical
5. That the industry's practices are unfair to dealers
6. That tariff protection is unnecessary

• • •

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

Methods to be Used

*a. *Personal contact*
*b. *Public addresses*
*c. *Printed matter*
**d. Publicity*
**e. Paid advertising space*
*f. *Radio*
*g. *Moving Pictures*

* *Personal contact publicity and paid advertising space should be the chief means employed.*

• • • •

In dealing with public officials, personal contact by men who have the right address, entree and full information is important. These public officials fall, chiefly, into the following groups:

1. Federal and State officials
2. U. S. Senators and Representatives
3. State legislators
4. City and County officials

These contacts should be planned, scheduled and checked up by a central office. Printed work will go on at the same time, will prepare the prospect in advance of the call, will reinforce the effect of the call after it has been made."

The Plan continued for several paragraphs, outlining the problem of educating the public to support public offi-

cials in the viewpoints which they might take, pointing out that they could not be expected to act upon a favorable point of view while their constituents held an unfavorable one. The Plan then went on:

"Reaching
Other Groups

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

Newspapers must also be contacted. Here the contacts may be made both by cementmen and by representatives of the Public Relations Bureau.

Building material dealers misunderstood the industry. They have no notion of the way the industry builds business for them—nor of the cost of that effort. Here cement company salesmen can be used. Suitable printed matter should be available for use at and after their calls.

The following groups will be informed largely by the printed world but also, to some extent, through addresses to civic, professional, and other bodies:

The public
Business leaders and financiers
Contractors
Engineers and architects

Two
Fundamentals

No matter how clever the planning, adroit the arguments and skillful the execution, no matter if the expenditure be most liberal, a public relations program will fail unless at least two fundamentals are complied with:

1. The proponents themselves must be fully convinced of the soundness of their case and of the need of presenting it.

Specifically, for us, we must 'sell' the cement company executives and employees on

a. The necessity for our public-relations program

b. The soundness of our selling practices

c. The contribution which the industry makes to individual and public welfare

Unless this is done, we lose a very valuable selling force—our own employees—and we will not sustain the program long enough to make it effective.

2. We must be alert to prevent the development of unsound practices—those that might do injustice as between members of the industry or that might be unfair to our employes or the public. Our public relations cannot be sound unless our policies and practices, within the industry, and in relation to the public, are sound. In other words, we must always go before the public with clean hands.

The maintenance of sound practices necessarily compels us to think not only subjectively, that is, of the effect of policies upon ourselves, but objectively, that is, of the effect of the policy on the public. We must put ourselves in their place. We must see ourselves as the public sees us.

The Plan then stated procedure to be followed and the type of publicity which may be embraced in various types of literature, publicity matter, paid advertising, radio and motion pictures. It outlined briefly a personnel staff to supervise the work, and concluded with a statement of the 'Approximate Number of Leaders of Groups to be Convinced (Based on experience with mailing lists)' as follows:

[Italicized part quoted in Fdgs. Par. Twenty-one (d)]

1.	*Federal officials*	*695*
	State officials (including highway engineers)	*291*
2.	*Newspapers—primary list*	*2,500*
	—second class list	*2,500*
	Magazines and Journals	*250*
	General and Economic Writers	*200*
	Financial Editors and Writers	*305*
3.	*U. S. Senators and Representatives*	*531*
4.	*State Senators*	*1,661*
	State Representatives	*5,662*
5.	*County Commissioners*	*8,704*
	County Engineers	*2,200*
	Mayors and City Managers	*5,750*
	City Engineers	*2,120*
6.	*Building Materials Dealers about*	*30,000*
7.	*Civic Leaders*	*7,500*
	Financiers	*15,000*
8.	*Contractors, all lists*	*40,000*
9.	*Concrete Products Mfrs.*	*6,500*
10.	*Engineers (civil)*	*2,100*
	Architects	*14,500*
11.	*Cooperating Organizations*	*250*
12.	*Other industries on common ground*	*4,674*
		153,853"

At the same time the Committee released a circular recommending immediate steps to conduct a public relations program to be carried out through the P.C.A. and to appropriate the necessary funds, at the expense of the Cement Institute.[19]

[19] Com. Ex. 439.

On May 10, 1934 the Trustees received a report that some of the districts had voted for and approved the plan of the Public Relations Committee and suggested rates of dues to finance the work, but several districts had not yet taken action. Treanor, President of Riverside, moved that it would be impractical to conduct such a movement without full support of members in each district and that district trustees should be earnestly requested to call meetings to secure this support. Treanor's motion was carried.[20]

On July 19, 1934, the Committee circularized the members with copies of the first three advertisements published by the Committee together with a circular to all employees drawing attention to the advertisements and to their purpose and soliciting interest in them in order that the employees might be better prepared to defend the industry and promote the use of cement.[21]

At a meeting of trustees on August 15, 1934 Affleck reported:

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

"Representatives of the committee discussed the proposals either formally or informally in all districts but one east of the Rockies. Except in this district, (#10) the underlying strategy of the committee's proposals has been generally approved although some details have been changed in accordance with suggestions submitted.

Proposals for beginning active work in any state or district have been temporarily held up. At the same time it seemed important to get started on something and in accordance with the approval of the trustees at the March meeting, the committee began a campaign in national media including such general magazines as Time, Business Week, United States News, and Editor and Publisher. Eight ads were used in these magazines. In addition two ads

[20] Com. Ex. 620 B: Trustees' Minutes.

[21] Com. Ex. 916 G-J.

were used in the following technical papers: Architectural Record, American Builder, Construction Methods, Engineering News-Record and Pencil Points.

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

In the series of eight ads, the first two were of an introductory nature designed to get the good-will of the publishers and the readers and the subsequent ads were on various phases of our marketing practices. This series is completed.

The expenditure so far totals, in round figures, $30,000.

At the meeting in Chicago, the trustees of the Institute also empowered the committee to employ the personnel needed to study the necessary angles of this subject and to carry out a public relations program. On vote of the members of the Public Relations Committee, Colonel John B. Reynolds was employed as of August 1 to head up the Public Relations Bureau.

Temporarily the staff of the committee is headquartered at the offices of the Portland Cement Association in Chicago. This has the approval of the President of the Association. If there is any question about this, this may be a good time to discuss it.

As mentioned in the Report of the Committee, a vote has been held in districts 1 to 9 inclusive. In some districts this was unanimous—in others it was by a large majority but not unanimous. It may be that representatives of districts 10, 11 and 12 present here today can advise regarding the status in their districts."[22]

Affleck then moved that the expenses of the Committee to date and the employment of Colonel John B. Reynolds and such additional personnel as might be necessary be approved, and this motion was unanimously carried. An assessment for this work of one-half cent per barrel shipped from July 1 by all companies was approved.

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[22] Com. Ex. 621 D-E.

The status of the Public Relation Plan in Districts 10, 11 and 12 was reported as follows:

[Italicized part quoted in Fdgs. Par. Twenty-one (e)]

"District #10—Trustee not present. Previous correspondence indicated disapproval.

District #11—No action taken.

District #12—All but two members approve."[23]

Illustrations of the advertising were introduced in evidence. They appeared under the following titles:

Ad No. 1.—"Prolonging Our Lives"
(Com. Ex. 434)

Ad No. 2.—"Progress in Cement"
(Com. Ex. 435)

Ad No. 3A.—"The Going Price"
(Com. Ex. 436)

Ad No. 4.—"Keen Competition"
(Com. Ex. 2835)

Ad No. 5.—"Buyers Get What They Want"
(Com. Ex. 2836)

Ad No. 6.—"Wheat and Cement"
(Com. Ex. 2837)

Ad No. 7.—"The Story of A, B & C"
(Com. Ex. 2838)

Ad No. 8.—"The Same Economic Law"
(Com. Ex. 2839)

In No. 4 of these advertisements, it was stated:

[Italicized part quoted in Findings, Par. Twenty (g)]

"Since portland cement is a standard product as uniform as any given grade of gasoline, sugar, or

[23] Com. Ex. 621 E.

wheat, buyers in any town or city will purchase it only from the cement plant that quotes the lowest delivered price. The lowest delivered price offered by a cement plant tends to pull prices offered by all other plants down to its level. Unless some plant ventures to quote a lower price, this lowest price—as in the case of gasoline, sugar, or wheat—is the price below which no plant will go to get the business."

In No. 5 of these advertisements, it was stated:

"Because buyers wanted a simpler plan of buying, manufacturers began selling cement delivered at destination instead of f.o.b. mill. This plan has been in use for more than thirty-five years. Under this plan the freight is included in the price the buyer pays for cement at the place where he wants it. *It is the simple and natural way to sell a standardized product like cement.*"

In No. 6 of these advertisements, it was stated:

"*Since cement is a standard product as uniform as wheat or sugar of any given grade, buyers at any point will buy it only from a cement plant that is quoting the lowest price.* Other cement plants, no matter where located, must meet this lowest price if they want the business. The lowest price becomes the going price."

In No. 8 of these advertisements, it was stated:

"*Since cement is a standard product, conforming to government specifications, buyers will buy it only from a cement plant quoting the lowest delivered price.* Other cement plants, no matter where located, must meet this lowest price, or fail to get any of the business."

On July 29, 1934, Treanor, President of Riverside, wrote to Smith, chairman of the committee, saying among other things:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"I haven't seen our recent advertising about the basing-point system. There was an ad on Horton's desk. I doubt if it is making a good impression. *I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed.*"[24]

On July 31st Treanor wrote to Mehren, President of the Portland Cement Association:

[Italicized part quoted in Fdgs. Par. Twenty-one (c)]

"Thanks for the proofs of the ads. They are well written and I think very good advertising for normal times. Neither do I think any serious offense can be taken at these ads by the Federal Trade Commission, or anyone else. *The worst that can be said is that the economic foundation, for some of these discussions of price making is frail. With that opinion I am inclined to agree, believing that no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement. This is not a subject which can be presented to the public through advertising, or in any way. It is an argument that has to be made and can be made in special places where it may be calculated to do some good.*"[25]

The Bureau headed by Colonel Reynolds became known as the Cement Information Bureau and at the Trustees' meeting on February 14, 1935 Affleck reported that its activities had gone forward along the lines originally approved; interest in the work of the bureau had been stimulated and the bureau had made contacts with special

[24] Com. Ex. 938 Y.

[25] Com. Ex. 938-2 A.

writers and financial editors. He stated that the bureau was then engaged in a study of labor relations with the assistance of the Labor Committee. An appropriation was made for the support of the bureau by the Trustees at this meeting.[26]

The work of the Committee in endeavoring to stimulate company executives to make contact with public officials in their states and to explain to them the economics and methods of the cement industry is illustrated by correspondence between Reynolds and C. B. Condon, General Manager of Hawkeye at Des Moines, Iowa.[27]

At their meeting on May 19, 1936 the Trustees approved a state legislative reporting service conducted by the Cement Information Bureau in the State of Pennsylvania.[28]

Affleck reported under date of July 20, 1935 to Reiter, General Manager of the Institute, on the activities of the Committee and the Cement Information Bureau which it conducted under the management of Col. Reynolds. After referring to the fact that the Trustees at their meeting of August 15, 1934 determined to hold the advertisement campaign in abeyance, the report outlined the work undertaken by the Committee as follows:

> "Under the direction of the Committee and with the cooperation of its members, a great deal of material has been compiled and disseminated to the industry itself as well as to individuals and agencies outside.
>
> The Bureau has opposed through publicity and in cooperation with members in affected territory, the construction and operation of cement plants by various governmental units or agencies. It has helped to keep Institute members advised of events directly or indirectly affecting the industry.

[26] Com. Ex. 622 D: Trustees' minutes.

[27] Com. Exs. 2233-2236.

[28] Com. Ex. 625 E: Trustees' minutes.

It has ascertained reactions of public opinion toward the cement industry by compilation and study of comment in newspapers and periodicals of many types. It has attempted to reply by written communication to such criticism of the industry in publications as has come to its attention.

It has supplied information regarding the industry on request. It compiled and distributed to the members certain information in statistical and graphic form in regard to basing price systems.

Effective contracts have been made with many leading writers and newspapers by means of personal calls and correspondence.

During the 16 months of its existence, more than 65 separate mailings of about 9,200 pieces of material, including letters, bulletins, reprints of news items, information regarding legislation, etc., have been made to member companies. During the same period, more than 11,000 pieces of publicity and printed material favorable to the industry have been sent in six mailings to special writers, public officials, newspapers and magazines.

The series of Institute advertisements with imprinted messages was mailed at the request of 44 member companies to more than 23,000 employes and stockholders.

Assistance has been rendered to officials of the Portland Cement Association in compiling figures needed for certain Association activities, especially in connection with the 'Cement and Concrete Reference Book.' The statistics included in this book and parts of the subject matter were prepared by the Bureau, and distribution of the book was under its supervision except to members of the Association. The book was sent to public officials, libraries, special writers, and newspaper editors. For the book soon to be issued the same work has been done.

There has been built up a thoroughly reliable and current mailing list of selected special writers, newspaper and magazine editors and others which has been available for instant use when needed.

There has been the closest cooperation wherever possible with other committees of the Institute as

for instance in the preparation of newspaper and magazine stories for the industry. The Bureau has worked also with local materials committees in endeavoring to create public opinion opposed to erection of state barriers.

For the Labor Committee a detailed study was made of conditions in other industries, together with methods used successfully while strikes were in progress. This study is now in the process of final completion and when approved by the Labor Committee will be distributed to members of the industry for their use. Included in the report also will be an analysis of public relations activities of other industries and certain suggestions of applicability to the cement industry. It has been the privilege of the Bureau to furnish certain members with this type of information when they are faced with the possibilities of labor trouble themselves.

The Tariff Committee has indicated its desire to have the assistance of the Bureau in future tariff activities in behalf of the industry.

In anticipation of future advertising campaigns, a survey was made of opinion in several communities in an effort to determine what erroneous ideas in the minds of laymen, architects, contractors, dealers, etc., should be the subject of this effort. The survey was reproduced and distributed to the membership.

During the time action on the so-called Wagner Labor Relations Bill was pending in the House of Representatives, a special committee was appointed by the President with the authority of the Board of Trustees, and Colonel Reynolds of the Bureau was assigned to duty in Washington for the purpose of adding such force as might be possible to the opposition of other factors of industry to this piece of legislation. Reports which have been received indicate that the contribution of the industry in this respect was of value and that, in spite of the passage of the Bill, the joint effort of the cement and other industries will be of lasting benefit to all of them. Colonel Reynolds has received appointment as a member of its Committee on Public Activities by the National Association of Manufac-

turers through Mr. C. L. Bardo, President. This is in connection with a movement toward the safeguarding of American industry, and his appointment may be considered a tribute to the cement industry.

At present some thought is being given to the possibility of establishing within the Bureau a service to the industry whereby legislation in the various states, especially in regard to taxation, will be scrutinized and information thereto supplied to interested member companies immediately so that opposition, where necessary, can be organized in time to be effective. With the present tendency of taxes to increase, this should be of great value to the industry. Whatever may be done in this connection will, of course, be submitted to the proper authorities for approval before being undertaken."[29]

The Trustees at their meeting on September 10, 1936 at which they received the report of the Future Activities Committee and drastically curtailed the activities of the Institute, passed a motion to the effect that the services of Col. Reynolds be discontinued immediately.[30] With this the work of the Committee came to an end.

7. Marketing Research: Burns-Clark Survey

During the controversy between government officials and members of the cement industry over the price of cement to be purchased for the building of the Tennessee Dam by T.V.A. John Treanor, President of Riverside had made the representations on the part of the industry. He got into this situation through his acquaintance with Dr. Arthur Morgan, the Administrator of T.V.A.[1]

The discussions in that matter had brought Treanor into contact with a number of Federal government officials

[29] Com. Ex. 1032 A-F.

[30] Com. Ex. 626 E:. Trustees' Minutes.

[1] *Supra*, Part IV E 5 b *i*, p.

and had impressed upon his mind the fact of criticism and suspicion of the cement industry predicated upon misconception of its economics and its methods and he came to believe that it was essential to the welfare of the industry to remove these misconceptions.

Treanor discussed with members of the industry and with members of the Federal Trade Commission and others the possibility of a joint study of the cement industry's position and its methods. On July 29, 1934 he wrote Blaine S. Smith, President of Penn Dixie:

> "Please confer with the boys and wire me whether I shall forward the enclosed letter to the Commission.
>
> I have reason to believe that things were about set to proceed with a suit to test the basing-point system as a collusive practice forbidden by Sec. 2 of the Clayton Act. If this study proceeds, I think this will not be done.
>
> I spent practically all day yesterday conferring with Commission staff members. I am well satisfied with the results. If we can go ahead with the study I feel sure we can transform the attitude toward the cement industry. I feel sure, once they understand our business, there will be no resentment of efforts confined to making a fair profit.
>
> I haven't seen our recent advertising about the basing-point system. There was an ad on Horton's desk. I doubt if it is making a good impression. I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed. There were one or two remarks about the N.E.L.A., which, of course, is in very bad repute.
>
> My cousin, William Stanley, is the ranking Assistant Attorney General. He took me in to Assistant Attorney General Stephens, in charge of anti-trust cases. A friend of mine, a professor of Harvard Law School, had also written him. Mr.

Stephens received me with extraordinary kindness. After hearing my statement he called Chairman Ferguson, saying that he had met me by chance, through these connections, knew nothing about the merits of my position but did know that I am a reliable person that the Commission can treat with confidence. Stephens also introduced me to Mr. Hardy, special assistant who prosecuted the cement case. I returned to Hardy's office later in the day for quite a thorough discussion. He was much interested in the analysis presented to the Commission. I couldn't want a better attitude.

Please send Mr. Hardy a copy of the letters when they are ready. Also to Dr. L. S. Lyon of Brookings Institution. Also MacFadden.

Dr. Lyon is an old friend of mine. I had dinner with him last night and we talked until midnight. You know, I presume, that he is now very influential in the N.R.A. He strongly criticises and opposed the 15% clause on government bids. Thought it scandalous for the government not to take the dose it prescribes for the public.

Lyon is a staunch defender of the open price but opposed to the waiting period. He would have secret rebates and manipulations, such as price raids, severely punished. That, he says, is all the aid to restraint of competition we are entitled to or that it is good for us to have. He also criticises VI, VII, and VIII of our code—the ones we are ready to scrap.

Lyon is inclined to believe N.R.A. will and should be continued and is in favor of a strong commission to handle it.

I went over my analysis of the cement industry carefully. He was especially impressed with the points about the basing-point system. I am to send him the Ferguson letters to read carefully. It is my own opinion that if we could get Brookings Institution, at moderate cost, to cooperate in the Federal Trade Commission study, it would turn out a better, fairer job and would serve to prevent an unfair or prejudiced interpretation. We must have someone. Brookings would be persona grata with

Commission and undoubtedly would influence economic interpretations.

David[2] told me he had spoken to you about Clark.[3] Clark is aware of our kind of problems and would be my choice next to Brookings. He must be approached most carefully or he won't consider it. Let me know what you think of sounding Brookings out, without commitment. Their prestige is, of course, very great, and the value of their opinion would mean more to us than any individual's. This is the way to spend what little money we have just now, not in advertising.

I saw Dr. Reave of T.V.A. I think he is chief executive officer or something of the sort. He knew almost nothing of the cement matter in detail and was most interested in my story. Please send him a copy of the Ferguson letters. I promised them. I think Reave is very well balanced. He is a factor to reckon with.

I believe I should forward this letter to the Commission promptly. It is expected and is part of the procedure arranged. The Commission will next act, asking me to see if I can interest the industry. Mr. MacFadden approves and tells me Col. Donovan does so, in general."[4]

The minutes of the Trustees' meeting on August 15, 1934, recite:

"The Chair requested Mr. John Treanor to place before the Board the results of his visits with the Federal Trade Commission. After the discussion which followed Mr. Treanor's remarks, the Board was canvassed and it was practically the unanimous sense of the meeting that the Industry should fully cooperate with the Federal Trade Commission.

The meeting recessed for luncheon and after luncheon the following Resolution was offered by

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[2] Probably Dr. Paul David, Economist on the Staff of T.V.A.

[3] Dr. J. M. Clark, Professor of Economists, Columbia University.

[4] Com. Ex. 958 F-G; 938 Y-Z.

Mr. Young seconded by Mr. F. H. Smith and unanimously carried: to wit:

Be it RESOLVED.

That the Board of Trustees of The Cement Institute believes that it is in the interest of the industry and of the public to promote sincere and truly cooperative studies concerning problems in the distribution of cement, and

Be it further RESOLVED

That the Board highly commends Mr. John Treanor for his personal efforts to explain cement problems to government agencies, and

Be it further RESOLVED

That the Chairman of the Board is hereby authorized to appoint a special committee to facilitate cooperation between government agencies and individual cement companies, and

Be it further RESOLVED

That the said committee—to be known as The Marketing Research Committee—is hereby authorized to retain such economists or other experts and aides as may be necessary to discharge its functions and to incur other necessary expenses, subject to the approval of the President of the Cement Institute, and

Be it further RESOLVED

That the Board specifically approves a cooperative study of methods of marketing cement on the part of members of this industry in collaboration with the Federal Trade Commission, and the Board hereby requests each member of the industry to accept the invitation of the Federal Trade Commission and the opportunity afforded by it to pursue a joint study of marketing facts and problems to the end that current individual methods of selling

and distributing cement may be more generally understood or improved.'"[5]

The Chairman appointed Blaine S. Smith, President of Penn-Dixie, Joseph S. Young, President of Lehigh and F. M. Coogan, Vice President of Alpha as the original members of this Committee.[6]

On the same day, Treanor wrote to Garland S. Ferguson, Chairman of the Federal Trade Commission, as follows:

> "After talking with you on July twenty-seventh, I talked with several members of the Commission staff, including Mr. Horton, Mr. Wooden, Mr. McIntyre, Dr. Stephens and Dr. White.
>
> Interest was centered upon the basing-point system. I suggested, as an example of the industry cooperation which I advocate, that a study might be made to discover just how the basing-point system does work under varying trade conditions.
>
> I suggested that data might be collected for a period of great building activity, during which the demand for cement was uniform throughout the country with most of the mills operating at full effective capacity. Such a period might be found during the years 1924-26.
>
> Another period might be chosen when great diversity of demand occurred in the several local markets. Some portion of the year 1930 might furnish such an example.
>
> Again, a period of uniform low demand could be taken from the records of 1932-34.
>
> Those data can be correlated with cost data, selling prices (both destination and *net* realized prices) freight rates, etc. A good idea will thus be gained of the mechanics of distribution under the basing-point system.

[5] Com. Ex. 621 B-C.

[6] Com. Ex. 621 F.

The same data can then be used for studies of the mill-price system under varied assumptions. Very sound inferences can then be drawn as to the probable behavior of the several local markets under the influence of such a system. The important questions to be answered would be: probable effect upon cost of cement to the public: effect upon present investments of the industry; upon required cement capacity; upon rate of utilization; upon the railroads; upon changes in railroad rates; upon company ownership of transportation, etc.

The staff members seemed interested in the possibilities of such a research as a guide to wise governmental action. I understood them to be personally in favor of embarking upon it, provided the full, frank cooperation of the industry can be assured.

I explained to these gentlemen that I had no right to speak for the industry. Before writing the present letter, however, I have taken the precaution to consult men representing a large majority of the producing capacity of the country and have been assured of their cheerful cooperation. There are other producers whom I have not been able to reach, who are entirely unaware of the discussions which have been taking place. These men will have to be informed of the nature and objectives of the proposed study before their cooperation can be obtained.

It would give me great pleasure to b[redacted] this matter to their attention and to the attention of the industry as a whole. The immediate purpose would be to obtain a competent analysis of the troublesome basing-point question—such analysis to be based upon accurate concrete data.

There is another, more important purpose which I have in mind. This is to establish such a relationship between my industry and the Commission that any matter deemed to be of public interest may be studied and discussed upon a plane of mutual confidence and respect. If this relationship can once be established, the Commission will thereafter be

assisted in all its proceedings by the complete, unreserved, and candid cooperation of the cement industry.

I believe that this relationship of confidence will result naturally from the basing-point inquiry, whereby the Commission will learn how ready and sincere and complete is the industry's desire to cooperate.

I would not care to make the effort to bring about these results unless I receive an indication that the plan has the Commission's approval.

The specific plan for the basing-point study will, of course, be formulated to yield the desired results with the minimum of trouble and expense to the industry. I assume that the industry will appoint an economist of standing to confer with the Commission's staff upon the details of the research.

As I expect to be in Washington later in the week, I will call at the Commission's office in case you are ready to discuss this matter further at that time.'"[7]

Sometime prior to October 2, 1934, Treanor was appointed Chairman of the Committee, and on that day he was again in Washington in conversation with the Federal Trade Commission. From there he wired Blaine S. Smith—

"TRADE COMMISSION DEVELOPMENTS YESTERDAY VERY GOOD BUT TODAY THEY SEEM STALLED STOP AM NOT SURE THAT IT HAS REAL SIGNIFICANCE STOP REGARDLESS OF OUTCOME I THINK IT WISE TO GET SOMEONE LIKE PROFESSOR CLARK AT WORK ON OUR PROBLEM I AM TO MEET HIM FRIDAY FOR FULL DISCUSSION AND WOULD LIKE TO ARRANGE MEETING OF MARKETING RESEARCH COMMITTEE YOUR OFFICE SATURDAY MORNING TO REPORT AND POSSIBLE ADOPT PLANS."[8]

[7] Resp. Ex. 3766 A-C.

[8] Com. Ex. 953-1 E.

The following day, Treanor wrote Commissioner Ferguson concerning a suggestion made by the Commissioner the day before that Treanor file a memorandum describing the contemplated study which Treanor was trying to persuade the Commission to undertake in cooperation with the industry. Treanor quoted from his letter of August 15th, previously set forth, and then after referring to the statement of the Commissioner that the Commission's staff was so far under the pressure of other work that it was almost impracticable for the staff to undertake the cement inquiry as proposed, concluded his letter by saying:

> "I suggested that if the Commission would authorize its economic staff merely to confer with economists provided by the industry, a large amount of useful data might be collected and put in form for consideration by the Commission at some later period when its staff may be working under less pressure.
>
> My purpose in asking for conference is to make sure that such research activities are directed to matters deemed useful and important by the Commission. The effect of conference with the Commission staff, and cooperation, which can be conducted so as to take a minimum of the time of the staff, will be greatly to advance the study of an important subject of general interest.
>
> May I here repeat what I have said to you more than once in conversation: If this study is undertaken, it is not our idea that the Commission, on that account, will refrain from or defer any action which it might otherwise take upon any matters relating to the cement industry which may now be pending.
>
> My earlier letters to the Commission have been written in my personal capacity as a member of the industry. I write this letter as Chairman of a Committee authorized by the industry to make arrangements with the Commission in furtherance of this general plan of study."[9]

[9] Com. Ex. 958-1 M-1 N.

On October 5th, Commissioner Ferguson replied to Treanor, stating:

"Your letter of October 3rd has been received and considered. The Commission appreciates the spirit of cooperation that you express on behalf of the cement industry and there is no disposition to minimize the value which may result from such a study as you suggest.

Your letter and oral statements indicate your appreciation of the problems which the Commission must consider. Among these are the facts that the Commission has already conducted and completed a series of investigations of the cement industry and that its staff is too limited to permit substantial diversion of their attention from other industries which have not received as much attention as yours.

The Commission is glad to have your assurance, as Chairman of a committee authorized by the industry to handle this matter, that there is no thought of restricting in any way the freedom of the Commission to take any action which it might otherwise take. The importance of this reservation is emphasized by the fact that there are pending before the Commission a large number of important complaints, from both private and governmental sources, regarding practices in the cement industry, and the Commission must of course remain free to dispose of these complaints without awaiting the results from your proposed economic investigation.

Subject to these conditions, the Commission accepts the proposal made in your letter to the effect that members of our economic staff be authorized to confer with economists provided by the industry concerning the character and form of data to be obtained by the industry through its own efforts. It should be understood, however, that members of our staff who may advise with economists selected by the industry have many other matters on hand and will have to subordinate their attention to this to whatever extent their other duties may require.

It should also be understood that any expression by members of the Commission's staff in the pro-

posed conferences is purely advisory and in no way binding upon the Commission as to the adequacy, usefulness or validity of the data or the conclusions that may be drawn therefrom."[10]

Treanor reported to Conn, President of the Institute, in writing, reviewing his conversations with the Federal Trade Commission and the Commission's unwillingness to proceed with the study at the time, stating:

> "The Commission is unwilling to proceed with the basing-point study at the present time. Several influences may lead to their refusal of which I will mention the following:
>
> (1) Shortage of staff. The Commission is actively engaged in studies of the steel industry, the milk industry, and the textile industry, in addition to its normal and routine activities. The Commission is proceeding on its usual budget. It has not been the recipient of special appropriations.
>
> (2) The Commission has received frequent, and I judge recent, complaints about the cement industry. These arise from the various national Departments, from some divisions of N.R.A., from state officials, as well as from private sources. The Commission fears that our proposal of the joint study, is a ruse to avoid or delay action upon pending matters.
>
> (3) The Commission is somewhat uncertain about its own future status or at least as to its future function, in relation to N.R.A. and to the President's recently appointed Industrial Committee headed by Mr. Richberg.
>
> * * *
>
> The lawyers of the Commission appear mildly opposed to the study preferring to stand upon the record of the past investigations. They prefer not to be hampered by implied obligations to delay ac-

[10] Com. Ex. 958-1 W.

tion pending the outcome of further studies which cannot possibly be completed before six or eight months.

Neither the legal nor economic staff which has heretofore handled cement investigations know of any specific proceeding contemplated against our industry. If the Commission has anything in mind, it is probably not specific, but merely a general attitude of suspiciousness encouraged by recent complaints.

• • •

In view of all the circumstances, I concluded in my own mind that it was well to suspend further effort to bring about the cooperative study at this time, and proceed to our own independent study by economists of known competence and character. The Commission economists seemed pleased to think this might be done. I mentioned Professor Clark's name to Dr. Francis Walker. He doubted Prof. Clark's willingness to make the study but intimated that if he did so his conclusions would be entitled to the greatest respect and would receive serious consideration by the Commission."[11]

On October 6th, Treanor wrote to Dr. John M. Clark and Dr. Arthur M. Burns of the Columbia faculty as follows:

"This letter, written on behalf of the Cement Institute, is intended to state briefly the effect of our recent conversations.

The basing-point system of marketing as practiced by the cement industry has been criticized as against the best public interest. We want this subject competently and impartially investigated. If a practicable system which better serves the public interest can be found, the industry wants to adopt it. If desirable modifications of the present system can be suggested, the industry wants to adopt them, if they are practicable.

The industry will give earnest assistance by supplying factual material.

[11] Com. Ex. 958-1 J-1 L: Letter dated 10/5/34.

> The report, when completed, is to be submitted solely to the Cement Institute for the use of its members and its staff. The report is not to be published, either in whole or in part, without the consent of both parties to its preparation—that is, the Institute and yourselves as authors."[12]

On the same day, Treanor wrote Conn, reporting that arrangements had been made with Professors John M. Clark and Arthur R. Burns of Columbia University—

> "* * * to conduct an investigation of the marketing problems of the cement industry. The effects of the multiple basing-point system are to be especially investigated from the standpoint of the public interest, as well as that of the industry. * * *
>
> The report, when completed, is to be for the sole use of The Cement Institute and its members, excepting as they may desire to extend its use."[13]

The following day, Treanor wrote to the Professors stating that in view of Chairman Ferguson's letter of the 5th, it was appropriate to modify their understanding insofar as it provided that the findings were to be submitted solely to the Institute.

> "We now contemplate that they will also be available to the Federal Trade Commission. You are also hereby authorized to discuss with complete openness all the details of the investigation, while it is in progress, with the economists of the Commission."[14]

At the same time Treanor replied to Commissioner Ferguson and after acknowledging the Commissioner's letter of October 5th, stated:

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[12] Com. Ex. 953-1 N.

[13] Com. Ex. 958-1 U.

[14] Com. Ex. 953-1 P.

"Your decision will also encourage the entire industry when it is communicated to them."

The letter went on to report the retention of Clark and Burns and set forth the subject matter of their inquiry as stated in Treanor's letter to Clark and Burns on the day previous.[15]

A further letter to Drs. Clark and Burns by Treanor on October 6th stated the membership of the Marketing Research Committee to consist of Coogan, Vice President of Alpha; Smith, President of Penn-Dixie; Young, President of Lehigh; Conn (ex officio) President of the Institute and Treanor, Chairman of the Committee and President of Riverside. Due to the fact that the chairman would be in California most of the time the letter states that Smith had consented to act as vice-chairman and advising them that "Mr. Smith speaks for the Committee in all matters without reservation." The letter drew attention to data which they would receive through Mallory, the Institute's statistician, and then stated:

"I think all members of the Committee would like to consider the form of your questionnaires pretty carefully before they are finally adopted. Some of the information required will be of a confidential nature, which you may have to receive direct under promise that it will not be disclosed to any member of the industry. Such data could not pass even thru Mr. Mallory's hands, and you will have to arrange yourselves for its proper handling. All of this can be worked out in consultation with Mr. Smith."[16]

Burns replied to Treanor on the 10th acknowledging letters of the 6th and 7th of October and stating they appeared to the writer to set out quite accurately the arrange-

[15] Com. Ex. 958-1 Y.

[16] Com. Ex. 971-1 B-1 C.

ments reached in the course of conversation and expressing satisfaction with the arrangement for discussion with the economic staff of the Federal Trade Commission and "your authorization of completely free discussion of the matter."[17]

Writing to E. J. Mehren, President of the Portland Cement Association on October 15, 1934 concerning his conception of the purpose of the study being undertaken by Professors Clark and Burns, Treanor wrote:

> "While this is called a basing-point study, because that is the thing the Federal Trade Commission is immediately interested in, I do not conceive it as limited to that one purpose. In fact, a thorough study of the basing-point system will inevitably embrace a survey of our trade practices as a whole."[18]

On November 4, 1934, Dr. Burns wrote Smith enclosing copies of a draft questionnaire for consideration by committee members and enclosing also a memoranda suggesting questions upon which the Professors desired advice and criticism. The letter stated that the writer was communicating with the Federal Trade Commission, submitting a copy of the proposed questionnaire and suggesting a conference.[19]

Treanor wrote Smith on November 19, 1934, referring to a letter from Smith on November 17th and stating:

> "1. The Trade Commission has always taken the position that for the investigation to be of value as a study of the relative merits of the basing-point and the mill-price systems, costs of production in the several mills must be obtained. I made this clear in my several discussions of the matter before the Institute. It is specifically included in my pro-

[17] Com. Ex. 958-2 P.

[18] Com. Ex. 571-1 K.

[19] Com. Ex. 571-2 Y-2 Z.

posal to the Commission inviting investigation, dated August 13th and October 3rd, 1934.

2. As to the need of checking individual questionnaires, this also was discussed at different times with representatives of the Trade Commission, not precisely in the form stated in paragraph 4 of Professor Clark's memorandum of November 12th, but generally in the sense of that paragraph. This was merely informative so far as I was concerned. I was not asked to say the individual mill figures could be checked and of course I had no authority to commit anybody and did not pretend to commit anybody. On one occasion at least when this subject was being discussed, I remember that two attorneys of the Commission were present in addition to the economists. They explained to me that the Commission has never *agreed* at any time not to make use of any information it acquires, even though from confidential sources, in any proceedings which may come before it. However, they told me that as a matter of policy the Commission had never in its history disclosed any information given voluntarily with the expectation that it would be treated confidentially. They told me of a long wrangle with one of the other important departments of the government (I have forgotten which) which was seeking to obtain information known to be in the Commission's files, which however was furnished voluntarily in a bona fide effort to assist the Commission. The Commission as a matter of policy and of good faith refused to disclose this information and prevailed in its refusal."[20]

Treanor again wrote Smith on the same day and after referring to discussions had concerning the proposed questionnaire continued:

"I am also on the whole satisfied with the attitude of the Federal Trade Commission as indicated by the report of the conference with Messrs. Stephens and White. Their comments are fully in the spirit

[20] Com. Ex. 953-3 G-3 H.

of the conversations with me. It is clear that they are taking this investigation seriously and will regard it as an important contribution to the industry marketing problem. It is clear they contemplate that this investigation may make it unnecessary for the Trade Commission to conduct its own investigation of these questions. That is a situation which I think we should be very anxious to bring about.

The important point which I think should be presented to the meeting is this: cement marketing practices are not going to go *uninvestigated*. The investigation can be an impartial, scientific one, conducted by competent people, in the light of continuous suggestion and interpretation of data by representatives of the industry who will have access to the finished report before it is presented to the Trade Commission (or the public if we see fit to publish it) thus affording the industry opportunity to suggest modifications if the report seems unfair in any respect. Or on the other hand, it can be an investigation by the Federal Trade Commission, more or less in its capacity of a policeman, more or less influenced by the known inclination of prosecutors to make out a case. In such event it will not be an impartial, scientific investigation and finally it will be a secret investigation, so far as we are concerned, with little or no opportunity afforded the industry to explain and interpret their trade practices as the study proceeds.

These are the two alternatives which confront our industry. I vote with all my heart for the first of the two and hope that an attitude of unreserved cooperation in the Clark-Burns investigation may be adopted by all the members of our industry."[21]

Smith wrote to Treanor on January 17, 1935 upon the progress of the proposed questionnaire. He stated that he had had two 3 hour sessions with the Professors and that the questionnaire was now corrected and boiled down to a point where the Committee as a whole should review

[21] Com. Ex. 953-3 I-3 J.

it for final analysis and conclusion. The letter said, inter alia:

"• • • Some of the detailed questions have been eliminated. This has been partly possible because the professors are getting to understand the question better and also they are appreciating that a good deal of the information they originally intended to seek by questionnaire can, as a matter of fact, be secured from the Committee in the form of figures, charts, and general information.

We are preparing a chart of all base prices at all base points in effect January 1, 1925, showing also the dates and the measures of each change up to January 1, 1935. These base price figures will be net in package, that is, after deducting cash discount and package, but not deducting bulk differential. Thus, differences in package charges, if any, and in discounts, will not confuse the figures. Our Traffic Manager, Mr. Browder, who is helping me in this work, wrote you today asking if you would undertake the preparation of facts and figures of this character for the Pacific Coast; similarly, we are asking Mr. Morse, of Boettcher's companies, for like information to cover the Mountain region. Everything east of the Mountains we think is now in accurate shape thru coordinated work of Universal Atlas, Lehigh, Lone Star, and our company. In other words, we think the records of these companies are comprehensive for all territory up to the Mountains.

The professors are willing to use the Price Waterhouse cost data collected about one and a half years or so ago for the country, which are, as to capacity, 83% representative, you will remember, instead of having another cost questionnaire go out to all companies. It will be necessary, however, to get the permission of all those who supplied figures to Price Waterhouse to turn them over for the confidential use of the professors. I am drafting now a form of request which will also ask for certain selling cost figures not previously supplied to Price Waterhouse, and I will send this to you in draft form for approval within a few days.

> In addition to the basing point statement above referred to, we are preparing for the professors other studies in the form of charts, maps, and statements."[22]

On February 8, 1935 Smith wrote the other members of the Committee stating that he had enclosed copy of draft of the questionnaire for the industry prepared by the professors and attaching with this letter a list of questions also prepared by the professors to serve as agenda for discussion at a meeting with the professors and the Committee. The list of questions enclosed involved an explanation of port prices, zone prices, duplicate base prices, base prices of limited geographical application, sales to Federal government at prices calculated by the use of land grant rates and special rates to the government, sales to railroads, sales to public authorities, the use of water transportation rates in calculating delivered prices, sales for delivery to trucks at the mill, and any other cases in which delivered prices are not the base price plus the all rail cost of transportation. The list of questions asked further for information on the use of silos and grinding plants, non-basing point mills and the effect of the basing point system upon price competition.[23]

The Trustees at their meeting on February 14, 1935 heard a report from Mr. Treanor on the work of the Committee and the preparation of the questionnaire, and it was unanimously—

> "RESOLVED that when the questionnaire is prepared the President of the Institute should communicate with all members calling their attention to the importance of the questionnaire and requesting prompt and complete reply."[24]

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[22] Com. Ex. 571-3 A-3 B.

[23] Com. Ex. 956-3 P-3 V.

[24] Com. Ex. 622 C.

At the request of Treanor, the President appointed Conn, the president of Giant a member of the Marketing Committee at this meeting of the Trustees.

Dr. Burns wrote Young, President of Lehigh on March 19, 1935 that he and Dr. Clark had conferred with the economists of the Federal Trade Commission "to obtain final confirmation of the questionnaire before it was printed. Their suggestions for amendment were for the most part verbal and can be accepted, I think, without formal confirmation of the Marketing Research Committee."[25]

When the questionnaire was about ready to be issued, Treanor put in the hands of the Committee the draft of a letter to members of the Institute in the following terms:

> "With this letter we are forwarding a questionnaire which has been prepared by Dr. John Maurice Clark and Dr. Arthur R. Burns of Columbia University for the purpose of collecting information which will enable them to analyze the effects of the present methods of selling cement. It was prepared with the cooperation of the Marketing Research Committee pursuant to a plan which has been frequently discussed at meetings of the trustees of The Cement Institute. Since it is now presented for the first time to the individual members of The Institute it appears advisable to review some matters about which the trustees are already informed.
>
> The Marketing Research Committee was created early in 1934 to deal with widespread criticism of the industry's marketing practices, particularly of the multiple basing point system of price making. Opposition to the system had gone far among officials in state, local and federal governments. Press articles had widely reflected the adverse feeling in official quarters. The members of the industry sincerely believed that this disapproval was based upon misunderstanding of the marketing problem of the industry. They were not conscious of any purpose inconsistent with correct business and economic

[25] Com. Ex. 913-7 B-7 C.

practice. They felt required to maintain their position, respectfully but firmly, believing that nothing but confusion would result from sweeping change not well adapted by analysis and study to the nature of the industry.

However, this position imposes an obligation to disclose all desired particulars of the industry's commercial practice to some competent independent agent of investigation and criticism. It is not only an obligation of good citizenship, it is a practical necessity to do so. No experienced person can suppose that an industry acting in its own interest will long be allowed to resist the purposes of responsible government officials, without clearly justifying their position. The Marketing Research Committee was created to devise ways and means to reconcile conflicting public and private viewpoints. If the industry's selling methods are against the public interest they must be changed. If modifications can be suggested which are at once desirable and practicable, the industry should adopt them. If the existing system is fair, its fairness should be recognized by the public and by the officers of government alike.

The Committee began by discussing the whole question with the Federal Trade Commission, the agency of government charged with the regulation of commerce. An approach to the Commission had already been made by members of the industry acting as individuals and upon this foundation the Committee tried to build. It tried to arrange a cooperative study of the questions involved. Undoubtedly such a study could have been arranged but for the heavy burden of work already upon the Commission and but for the limitation of its personnel and appropriations. The merit and sincerity of the industry's proposal of a joint study were cordially acknowledged by the Commission.

Failing to obtain direct cooperation with the Commission, the Committee endeavored to accomplish the desired result indirectly through independent investigation by economists whose competence and integrity of purpose would be acknowledged by

the Commission. It retained Messrs. Clark and Burns to conduct the study along the lines which had been informally approved by members of the staff of the Federal Trade Commission. The accompanying questionnaire has received the informal approval of the Commission's economic staff. The returns and the final report will be available for consideration by the Commission, possibly as a substitute for a formal investigation on its own part or as a supplement thereto.

Messrs. Clark and Burns are economists of the highest professional standing. They are peculiarly fitted to consider marketing problems where, as in the cement industry, high overhead costs are controlling factors. Their findings will be unimpeachable from the standpoint of fairness and sincerity. From the standpoint of economic interpretation their work will command the respect of the Commission and of economists throughout the United States."[28]

The letter closed with a strong appeal for cooperation on the part of every member of the Institute, and was signed by the members of the Marketing Research Committee. Treanor also submitted the draft to be sent by the President of the Institute which, after referring to the questionnaire and the effort which had been put on its preparation by members of the Committee and the professors after consultation with economists of the Federal Trade Commission, continued:

"* * * It is an effort to gain understanding and approval for our industry in so far as its commercial practices are proper; and to correct practices, if any there be, which are improper. It is an effort, by the reasonable procedure of study and discussion, to effect the readjustment of public and private view points—matters which in the past have too often suffered from blindness and prejudice on both sides.

[28] Com. Ex. 284 I-J.

> As President of the Cement Institute I wish to cast the full weight of my position in favor of the faithful completion of this questionnaire. If the returns are carefully made by each and every member of the industry, without exception, it will stand to our lasting credit and open the way to sound public relations.''[27]

The questionnaire, finally printed and distributed to members of the Institute on April 13, 1935,[28] was in two forms. One, for non basing-point mills, covered 140 separate questions many of which pertained to four different selected months, namely, June 1925, January 1928, June 1932 and January 1933, together with an elaborate tabulation of the net yield at mill. A modified questionnaire of similar character with 200 inquiries was prepared for basing-point mills. A set of special questions were prepared for mills that had changed from basing-point to non basing-point and vice versa, since January 1, 1925. Another special supplementary questionnaire was issued for chain mills and a further supplementary questionnaire for mills at which at any given time since January 1, 1925 there had been two base prices in operation. The amount of work involved in answering the questionnaire evidently brought inquiries and protests to the President of the Institute, for on April 27th, Conn, the President of the Institute, wrote to Carpenter, the President of Beaver:

> ''Recently I had one or two letters from manufacturers complaining about the amount of work involved in answering the questionnaire recently sent out. In both those cases I replied as follows:
>
> 'I agree with you that there is an immense amount of work in connection with the questionnaire of Messrs. Clark and Burns. My own or-

[27] Com. Ex. 284 K.

[28] Com. Ex. 593 A: Letter dated 6/19/35, Lundborg, Secretary of Institute to Reiter, General Manager of Institute.

ganization is naturally in the same position. I have discussed the various phases of it with our Mr. Robeson as to its importance, and we, frankly, have made up our minds that we just must find the time to cooperate by giving the material requested.

The survey, which Messrs. Clark and Burns have undertaken, is at the direct insistence of the Marketing Research Committee, who have already given a great deal of not only their own time but of their various staffs. In order to make this survey of the value that it should be to the industry, it has been necessary for this Committee to develop much more information than that which is required from those of us who are not on the Committee.

The way to decide for yourself would be to weigh the amount of time and labor necessary to develop the information against the advantages. What the Committee is endeavoring to do is, through the offices of Messrs. Clark and Burns, to develop a comprehensive study of our business so that we may defend our method of price-making.

You know from your contacts and your reading of the attacks that are being made in various quarters against the basing system. We cementmen with our marketing experience know the absolute necessity of our present method of marketing. Consequently, there is an obligation on the part of each and everyone of us to furnish as much material as we can, which will enable us to defend ourselves against future attacks, especially in view of the fact that the Blankenhead bill is now pending in Congress.

The Committee in conference with Messrs. Clark and Burns has worked this questionnaire to the point where the maximum amount of valuable information can be secured with the least trouble to the members of the industry. If it were possible to eliminate all or any part of this questionnaire, the Committee naturally would have been in favor of doing so.

Without complete cooperation from all members of the industry, Messrs. Clark and Burns are apt to get the impression that the industry is not cooperating with them and is holding back for reasons better known to themselves. I am sure all cementmen will realize that we could not permit this to happen. It was for this reason that the Marketing Research Committee sent along its special letter, and I in turn sent along the letter as President of The Cement Institute, asking all manufacturers to cooperate to their utmost.

'It is my judgment that any sacrifice you make in the way of labor and time will repay you a hundred-fold.'

I think this answers how I feel about them, and I do hope everybody in The Institute, or for that matter out of The Institute, will do their very best to answer as much of the questionnaire as is possible."

The exhibit notes upon the heading that the same letter had been sent to fourteen other manufacturers.[29]

There followed correspondence of some volume between the companies and the professors, most of it in the form of requests by the professors for a fuller explanation

[29] Com. Ex. 966 H-I.
A. B. Shelby, Calaveras
E. E. Duque, California
Coy Burnett, Monolith
C. T. W. Hollister, Northwestern
W. P. Cameron, Olympic
R. B. Henderson, Pacific Portland
John Treanor, Riverside
Geo. R. Gay, Santa Cruz
F. H. Powell, Southwestern
R. K. Neill, Spokane
Edwin P. Lucas, Superior, Inc.
A. Emory Wishon, Yosemite
W. H. George, Cowell
Eugene Enlow, Idaho

of certain of the answers and part of this correspondence appears in the evidence.[30]

The questionnaires, when answered, were sent directly to the professors[31] and were produced under a subpoena and appeared in the evidence as Commission's Exhibits 967-970, 972-976. These exhibits include the answers of fifty-nine different manufacturers.[32]

As to the purpose which manufacturers had in answering this questionnaire and their understanding of the merit of doing so, several gave testimony. Manley, General Manager of Hawkeye, in his stipulation stated:

> "(53) Witness recalls a so-called Marketing Research Committee of The Cement Institute. The Hawkeye Company understood that the function of that committee was to provide for an independent study, by economic experts, of the marketing methods of the cement industry. The Hawkeye Com-

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[30] Com. Exs. 956-5 R, 14 Y-14 Z, 15 C-15 E; 971.

[31] Reiter, General Manager, Institute (C) Tr. 3140.

[32]

Aetna	Hermitage	Penn Dixie
Allentown	Idaho	Petoskey
Alpha	Keystone	Pittsburgh
Ash Grove	Kosmos	Republic
California	Lawrence	Riverside
Castalia	Lehigh	Santa Cruz
Colorado	Lone Star	Signal Mountain
Consolidated	Louisville	Southern States
Coplay	Medusa	Southwestern
Cumberland	Monarch	Spokane
Dewey	National	Superior
Diamond	Nazareth	Superior Portland
Edison	Nebraska	Three Forks
Federal	North American	Trinity
Florida	Northwestern States	United States
Georgia	Oregon	Universal Atlas
Giant	Pacific Coast	Volunteer
Glens Falls	Pacific	Vulcanite
Hawkeye	Peerless	West Penn
Hercules		Yosemite

pany received a questionnaire prepared by Professors Clark and Burns. (Commission's Exhibit No. 976-12 W - 13 H.) In answering that questionnaire the Hawkeye Portland Cement Company understood that the purpose was to furnish the facts and materials regarding the marketing methods and practices prevailing in the cement industry. These methods and practices had been criticized by certain Government officials and politicians and it was the desire of the Hawkeye Company to have its methods and practices plainly understood. The Hawkeye Company had no contact with Professors Clark and Burns other than in submitting its answers to said questionnaire. In answering this questionnaire the Hawkeye Company presented the facts as it found them. There was no effort on the part of Hawkeye Company to influence Professors Clark and Burns, and the company has no knowledge or information of any alleged influence by anyone in the cement industry."[33]

Brooke, Vice President of Monarch, testified:

"A. Well, it was my understanding that it was to be a study of the methods of the industry by disinterested parties, with the view of determining whether or not we were doing things in a logical way; that is, marketing cement in the best and most logical way."[34]

Moore, Vice President of Dewey, testified:

"We understood that the questionnaire was to be taken into consideration; that is, our answers were to be taken into consideration by Messrs. Clarke and Burns, along with answers to questionnaires that were to be submitted by other companies, and a fair and unbiased summation be made therefrom by the Professors of practices prevalent at that time in the cement industry.

[33] (R) Tr. 41621-22.

[34] (R) Tr. 42226.

> We understood that there had been reports relating to the industry and its practices that had been broadcast by uninformed persons that were detrimental to the industry.
>
> This was a move to try and counteract those influences."[35]

Dr. Burns wrote to Smith on June 25, 1935 concerning various matters of inquiry upon which the professors still desired data and indicated that the replies to the questionnaires were coming in very slowly but they hoped soon to have enough to begin the statistical analysis which they contemplated.[36] He wrote again to Smith on July 10th acknowledging information about the industry from the Committee and again propounding questions.[37]

Treanor wrote to Smith on September 11, 1935 commenting on the nature of the work being done by the professors and saying inter alia:

> "Personally I am well pleased with the tone these men are taking. It is friendly, not dogmatic, and our main points have been established in their minds, to-wit, the importance of 'overhead' and 'idle capacity' in our industry, which make old fashioned unrestrained competition simply unworkable and some form of market control necessary. I am sure you recognize, as I do, the importance of having a pronouncement upon this subject from men of the professional standing of Clark and Burns (Clark in particular being in the front rank and an authority upon this especial phase of industry). This is especially true since their views are based upon the most complete industry data which has even been assembled. It is now our business to convince them that the particular solution of this marketing problem, which we use in the cement industry, is not hurtful to the public. I think we can do so.

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[35] (R) Tr. 46952 a.

[36] Com. Ex. 958-3 C-3 E.

[37] Com. Ex. 958-3 J-3 K.

Clark raises two interesting questions in this letter of August 30th—what he refers to as the 'group mill base', and the cost of cement in relation to general construction costs as stated in the last paragraph of his letter.

It seems fortunate to me that at this stage of their work we find ourselves in frank, friendly correspondence. Discussion can no doubt be continued until we have made our points as clear as we are capable of making them, and our views will be thoughtfully considered."[38]

And again on September 27th, Treanor wrote to Smith referring to a letter from Dr. Clark in which the Doctor made a suggestion that determination of the price at a given basing point "should not be left solely to the selfish interest of the mill located there", on the contrary that some industry responsibility should be involved in fixing the price levels. The letter went on to say:

"Now this is a very fruitful idea. It struck me at once that all of you boys would have a great deal to say about it. Progress toward order and cooperation would result from the general establishment of this principle. A first step in getting it established would be the considered opinion of such people as Clark and Burns in a formal report.

I have my ideas about this subject but our basing-point problems in California are so simple compared with yours that I would not venture to record an opinion with Dr. Clark without your guidance. I think today that this Clark-Burns investigation is just as important as I thought it the day it was organized and it was a little of a disappointment to me not to hear from the members of the Committee with a rather detailed expression of views upon the subject discussed above, as well as all the other matters which have passed across the counter in the last year. It seems to me this is our opportunity to knit them all together in a statement which will

[38] Com. Ex. 913-4 H-4 K.

make amends for the imperfections of earlier statements and pick up the various loose threads. I would be glad to try to formulate such a thing, submitting it to the Committee for approval before turning it in, if the Committee wants me to try it. If I do not hear from you within a reasonable time I will make a perfunctory answer to Clark's letter and let it go at that."[39]

On October 3rd Smith wrote to Treanor concerning the progress of the professors' studies and the assistance given them by members of the Committee:

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

"Joe Young and I have been just now discussing the progress that has been made in connection with the survey of the industry now being conducted by Professors Clark and Burns, particularly in reference to your last two letters to me, copies of which have also been sent to other members of the Marketing Research Committee.

At the outset, we should like to make it clear to you that every effort has been and will be exerted by the members of the Committee to clear up whatever points of doubt or dispute may still exist in the minds of the professors. I understand that considerable correspondence has passed between Dr. Clark and Joe Young in connection with the operation and effect of the Lehigh marketing plan. I, personally, have answered dozens of inquiries, sometimes on my own responsibility and more often after consultation with certain members of the Committee. Personal contact with the professors has, of course, been impossible during the summer months, because of their absence from the city, but, short of the actual interchange of ideas across the table, I believe that we have conducted as intelligent and as comprehensive an interchange of ideas as possible under the circumstances.

You suggest in your last two letters that it would be desirable for each member of the Commit-

[39] Com. Ex. 958-4 O-4 P.

tee to sit down individually and frame his own personal answers to the several fundamental points raised by Dr. Clark in connection with your admirable report on the marketing conditions in the cement industry, submitted to the Federal Trade Commission last year. Altho your first request along these lines was received by members of the Committee at least two weeks ago, I believe that all of the members of the Committee have been reluctant to comply with your suggestion for the same reasons which prompted me to delay answer.

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

Altho all of the members of the Committee in the East have had in mind the same objective that you evidently are striving for, namely attempting to mold the professors' minds before any definite conclusions have been reached, it has been our thought that much more could be accomplished by personal contact than thru the medium of correspondence. The plan that we have discussed is simply to arrange a meeting shortly with the professors, to which would also be invited—in addition to the members of the Committee—certain sales and traffic experts with general knowledge and wide experience, preferably from companies other than those represented by the Committee. The professor could possibly prepare in advance a list of questions that had proved particularly bothersome. These questions could be submitted to the group of cement men and we would attempt to have those best qualified discuss the points involved with the professors until the matter was thrashed out to everyone's satisfaction. By adopting this procedure we felt that we could more comprehensively and more completely answer the many points that unquestionably have arisen in the minds of the professors in reviewing the answers to the questionnaire form.

While the method that you have suggested perhaps will bring about the same desired result, there is every reason to believe that the statements that you would receive from the members of the Committee in answer to the several points submitted to you by the professors would be at variance and pos-

sibly in direct conflict. For example, in your last letter of September 27th, you ask for the opinion of the individual members of the Committee on the question of the determination of general price levels, particularly in reference to the selfish interests of non-basing point mills. Perhaps one reason why questions have been raised by the professors on this point is because of the answer submitted by the Lehigh Portland Cement Company to #18-B of the questionnaire, which called for a criticism of the report of the Federal Trade Commission on practices in the cement industry. In passing upon the report of the Federal Trade Commission, Lehigh makes quite a point of the variation in the general price structure the country over by reason of the fact that each mill or group of mills does not constitute a basing point. It may be that certain other members of the Committee may take an entirely different view, and there is no question but what certain groups in the industry would flatly challenge any such contention. Therefore, I frankly doubt the wisdom of attempting to obtain statements from members of the Committee on questions upon which there is so little agreement.

[Italicized part quoted in Fdgs. Par. Twenty-one (g)]

Please turn this matter over in your mind and, if you still feel that some good might flow from an interchange of views by correspondence on certain of the subjects upon which the professors would like further enlightenment, I will be delighted to discuss the matter further with the committee. *If you are inclined to agree with our views on this matter, will you kindly let me know when you next intend to be East, with the thought that a general meeting between the professors and the cement group could be arranged to suit your convenience.*

Joe Young concurs in the thoughts expressed above."[40]

When Coogan, who was also a member of the Committee, was on the stand, this letter was drawn to his at-

[40] Com. Ex. 571-2 L-2 N.

tention and the sentence involving the phrase "mold the professors' minds" read to him and he was asked whether the letter described his objectives and whether it was one of his objectives to mold the professors' minds. Coogan answered:

> "A. I received a copy of the letter which is referred to, and I read it over. It was my own objective to simply see that the professors or economists had all of the correct and true information on which they could arrive at an appraisal of the cement industry, and I am quite sure that Mr. Smith's letter does not—at least, to me, did not mean anything except trying to give them the whole truth and the whole picture of our industry."[41]

On October 7, 1935, Treanor wrote to Smith. He advised that it seemed unlikely that he could attend a meeting of the Committee to discuss the subject of study with the professors since "Mrs. Treanor is becoming quite averse to letting me travel by air." He stated his desire to resign as Chairman of the Committee and his feeling that the reason initially prevailing for his having accepted the chairmanship was no longer valid.[42] This letter in its tone presaged the outcome of physical difficulties then besetting him. Mr. Treanor died before the end of the year.[43]

The slow and painstaking work of the professors is indicated in correspondence with Smith after the questionnaires came in. For example, Burns wrote Smith on March 9, 1936 referring to information as to port prices being collected and furnished by Browder, the traffic manager of Penn-Dixie, and the desire of the professors to get similar material for zones. The letter refers to the fact that they are then revising the first chapter of their study and Dr. Burns enclosed some six separate questions

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[41] Coogan, Vice President, Alpha (R) Tr. 23946-47.

[42] Com. Ex. 958-4 T-4 U.

[43] Beckett, President, Riverside (R) Tr. 42877-78.

relating to transportation costs, trucking price bases and the disposition of fractions in calculating freight rates.[44] Mr. Smith answered these inquiries with painstaking care and submitting data which must have been secured from several sources.[45]

Burns wrote to Smith on March 30, 1936 saying:

> "I enclose another copy of our prepared statement on the basing point system, which has been amended in several respects on the basis of our recent conversations."[46]

On the same day Smith presented before the Senate Interstate Commerce Committee on the Anti-Basing Point Bill (Wheeler Bill) a prepared statement dealing in part with the basing point system, part of which appears in the record.[47]

Smith reported to the Trustees on May 19, 1936 that the Committee expected the first two chapters of the report of the economists on June 1st and the remaining four chapters by August 1st,[48] indicating a manuscript of six chapters. At their meeting on June 19th, however, Young in the absence of Smith reported that Clark and Burns had completed about three-fourths of their report in tentative form which would be submitted to the Committee within a week or ten days and that the report should be completed and ready for distribution within thirty or forty-five days.[49]

Burns wrote to Smith on June 15, 1936 stating that he enclosed the first installment of the draft manuscript "on

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[44] Com. Ex. 958-5 C-5 D.

[45] Com. Ex. 958-4 W-5 B: Letter dated 3/17/36.

[46] Com. Ex. 971-25 L.

[47] Resp. Ex. 3745 A-E. See also Com. Ex. 2878 D-E.

[48] Com. Ex. 625 C.

[49] Com. Ex. 603 C: Institute Minutes.

the basing-point system". He explained that this was rather less than half of the chapters but more than one-half of the total volume. He states that a large part of the value of the questionnaires "lies in the fact that for the first time they make it possible to measure some of the consequences of the basing-point system". He emphasized, however, that the material was still in draft form and might require a good deal of change but that the authors of the report were anxious to get the reaction of members of the industry. He enclosed a draft table of contents which indicated the following chapters:

"THE BASING POINT SYSTEM IN THE CEMENT INDUSTRY
1925 – 1934

I. The Basing Point System and Methods of Selling Cement.

II. The Basing Point System and the Theory of Competition and Monopoly.

III. Specific Features of the Cement Industry Bearing on the Character of Competition.

IV. The Direct Effect of the Modified Basing Point System Upon the Sales Revenue of Mills: Base Mills.

V. The Direct Effect of the Modified Basing Point System Upon the Sales Revenue of Mills: Non-Base Mills.

VI. The Price of Cement.

VII. Competitive Pressures on Prices.

VIII. The Costs of Production and Marketing.

IX. The Importance of the Basing Point System as a Factor Influencing Prices and Costs as Compared to Other Characteristics of the Cement Industry.

X. The Probable Effects on the Cement Industry of Various Proposals for Modifying Basing Point Systems.

XI. Summary and Recommendations.

XII. The Relation Between Marketing Systems and General Economic Stability (Tentatively Projected)."[50]

Smith wrote to Conn on July 2nd that the first five chapters were then in the hands of Committee members and that as soon as each member had digested it the Committee would get together for discussion to be followed by meeting with Dr. Burns or with both Burns and Clark, upon Clark's return from Europe. Smith stated that he hardly expected the work to be completed before the end of October.[51] The minutes of the Trustees at their meeting on December 17, 1936 record:

> "Mr. Blaine S. Smith as Chairman of the Marketing Research Committee made a verbal report indicating that the work of Economists Clark and Burns has been more voluminous than was expected and the corresponding report itself has become more comprehensive. The Economists' report in its present form will be divided into nine chapters of which five have been reviewed by the Committee. Manuscript for three additional chapters should be in the Committee's hands before the end of January, whereupon the Committee will discuss and analyze the material. The concluding chapter is not yet written and its completion awaits considerable additional work both by the Economists and the Committee. Mr. Smith suggested to the President the addition of Messrs. D. S. Browder and J. C. Bowen to the Committee inasmuch as these two members of the Industry had handled considerable work for the Committee. Mr. Smith stated that because this

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[50] Com. Ex. 958-5 J-5 L.

[51] Com. Ex. 958-5 N.

report could not be completed and printed for some months, an expense for 1937 would be occasioned by the Committee's work not contemplated when the 1937 budget was approved by the Board at its meeting on September 10, 1936, and presented an itemized budget indicating such 1937 Committee expense at $6,350.00 and moved that this budget be approved as an additional expense to be paid from surplus of The Institute. Motion was seconded by Mr. Rader and unanimously carried.'"[52]

The Committee, by appointment of the President, at that meeting consisted of Blaine S. Smith, Chairman; J. C. Bowen, D. S. Browder, C. F. Conn, F. M. Coogan and J. S. Young.[53]

On December 22, 1936, Smith wrote to the other members of the Committee:

"Attached is memorandum I just received from Dr. Burns, which I told you of the other day, dealing with possible modifications of the basing point system. In transmitting the memorandum, Dr. Burns says:

'There are blanks in the memorandum at one or two points where we feel that we cannot make our suggestions more specific without the benefit of discussion with members of the Committee. We are anxious that the memorandum should be fully discussed before we proceed to the drafting of the final chapter of the report. Perhaps you will be good enough to let me know when you are ready to meet us for the purpose of this discussion.' "[54]

Coogan, a member of the Committee, could not recall any discussion at meetings of the Committee concerning the suggestions of the professors.[55]

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[52] Com. Ex. 627 C.

[53] Com. Ex. 627 D.

[54] Com. Ex. 958-5 o.

[55] Coogan, Vice President, Alpha (R) Tr. 24993-94.

On May 18, 1937 Smith reported to the Trustees that "some progress had been made by Professors Clark and Burns since the last board meeting and that the Committee hoped to have most of the manuscript within a few weeks", and adding that there would still be a great deal of work for the Committee to do after receiving the report.[56]

On May 25, 1937 Burns wrote to Smith stating *inter alia*:

[Italicized part quoted in Edgs. Par. Twenty-one (g)]

> *"With further reference to my recent telephone conversation with you, I have now mailed mimeographed copies of the last two chapters of the study. These are the chapters which I then promised as the next instalment of the work.* • • •
>
> *There now remain four chapters which you have not seen.* • • •
>
> • • • I hope that my absence will not cause any inconvenience. *I shall do my best to see that the whole of the balance of the study is handed to the stenographer before I leave. I imagine that this material will take some time to digest and that active discussions leading up to the final preparation of the material for publication can be taken up as soon as I return."*[57]

On June 18 Smith wrote to the members of the Committee enclosing drafts of Chapters VIII and VIII A that day received from Dr. Clark.[58] On August 13 Smith called a meeting of the Committee to be held August 20, 1937 in New York.[59]

The record does not carry the affairs of the Marketing Research Committee beyond this date.

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[56] Com. Ex. 628 B: Trustees' Minutes.

[57] Com. Exs. 913-1 D, 971-29 D.

[58] Com. Ex. 913-1 A.

[59] Com. Ex. 913-2 N.

Several witnesses were examined by Counsel for the Commission in an effort, apparently, to establish that the work of the Committee and the employment of the professors were with the sole purpose of preparing a defense of the so-called basing point system. Hogan, President of Lone Star, had testified that he did not regard Treanor with his experience in Southern California as a man acquainted with marketing problems of cement in the greater part of the United States. His testimony continued:

"Q. Would you say that, despite the fact he served as chairman of the marketing research committee—— A. I would still say that.

Q. (Continuing) —And despite the fact he was shown to have been selected as emissary to employ Dr. Burns and Dr. Clark in writing up the defense of the basing point system for the Cement Institute—— A. When were they employed for that purpose?

Q. It is August and September, 1934, according to the record. A. That wasn't why they were employed, in the first instance.

Q. Why were they employed? A. To make a study of the cement marketing practices.

Q. For what purposes? A. For the guidance of the cement industry.

Q. And not to educate the public on what the leaders in the industry thought they were doing? A. No, that was not the object of that. The study was made just the same as you would go out and hire a surveyor to make a survey.

This was done in the Cement industry just to see what was going on in the marketing situation."[60]

Browder, Traffic Manager, Penn-Dixie, questioned with the same purpose apparently in mind to establish that the employment of Clark and Burns was all part of a public relations campaign, testified:

"Q. What part did you play in the Public Relations Committee work of The Cement Institute, Mr.

[60] (R) Tr. 34737-38.

Browder? A. None. I have not had any connection with the Public Relations Committee.

Q. Don't you consider that the work of Professors Clark and Burns was related to the Public Relations Committee work of The Cement Institute. A. I did not understand that it was, no.

Q. It was a matter of attempting to explain to all people the operation of the basing-point system in the cement industry, wasn't it? A. No, I did not understand that.

Q. What did you understand to be the significance of the work of Professors Clark and Burns and the Marketing and Research Committee? A. The Marketing and Research Committee was to undertake a cooperative study with the Federal Trade Commission as to practices in the cement industry through economists.

* * *

Q. Was that still your understanding when you were called in as a member of the Marketing and Research Committee and handed portions of the report to read and review along with Mr. Blaine Smith and Mr. Joseph Young before it was to be published and criticize it? A. I do not recall now that there was any public relations arrangement in connection with it. It was all the joint study by these economists of the Federal Trade Commission and Doctors Burns and Clark as to the practices of the industry.

Q. Can you cite anything that you consider as evidence of cooperation between the Federal Trade Commission and the Marketing and Research Committee of The Cement Institute? A. As I recall now, the questionnaires before they were sent out to the various cement companies were submitted to the Federal Trade Commission for criticism or suggestions, and as I understand it the Federal Trade Commission did finally abrogate any understanding we had about a joint study, and it was then carried as a study by these economists, Drs. Clark and Burns, without the joint cooperation of the Federal Trade Commission.

Q. What do you base your understanding on in that respect? A. As I recall it now, it was conversations that Mr. John Treanor had with members of the Federal Trade Commission.

Q. You did not participate in those, did you? A. No, I did not participate in those, but in conversations, subsequent conversations with him I understood that the Federal Trade Commission had withdrawn their cooperation or their joint efforts in the matter.

Q. And were to have nothing more to do with it?

* * *

A. No, I did not understand that the Federal Trade Commission was to have nothing more to do with it. As I understand that; all of this was to be handled with a certain amount of cooperation from the Federal Trade Commission. I did not know that they had——

By Mr. MacIntyre:

Q. What did you mean by the word 'withdrawal' of the cooperation you just referred to? A. Well, as I say, at first it was my understanding that it was to be a joint study by economists of the Federal Trade Commission and Drs. Clark and Burns, and that later the Federal Trade Commission withdrew the direct cooperation of their economists in this, and the study was simply to be made by Drs. Clark and Burns and submitted, and so forth, and handled, in so far as they could, in cooperation with the Federal Trade Commission.

Q. Do you know of anything of any move that Professors Clark and Burns ever undertook to submit anything that they prepared to the Federal Trade Commission subsequent to that?

* * *

A. No, not of my own knowledge, I do not know of anything that they did after the submittal of the questionnaires.'"[61]

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[61] (R) Tr. 38541-45.

And again, when Bo..en, Vice President of Lehigh, was on the stand, the questioning took the same course and witness testified:

> Q. I am asking what the Lehigh Company did with reference to any attempt to influence the Institute or other members of the Institute, regarding price policies. A. You stated price policies, now. I understood you to say in the first instance sales policies.
>
> Q. Well, sales policies or price policies. A. Mr. Wooden, except for such discussions as may have taken place during the Code period, I know of no case in which the Lehigh Company has attempted to influence the Institute or any member thereof as to sales or price policies.
>
> Q. Do you still make that answer, notwithstanding the Lehigh Company's participation and your participation in the work of the Marketing Research Committee through 1936 and 1937? A. Yes, I do. I don't consider that general research into any subject constitutes an attempt to influence the Institute or its membership.
>
> Q. Well, weren't you attempting, in that research, to find ways and means of defending and maintaining the basing-point system? A. No, Mr. Wooden. I considered the work of the Marketing Research Committee to be one of studying the entire field of cement marketing. If that research showed that there was anything wrong or unsound about our methods of selling, or if that research could eventuate in any better or sounder or more acceptable method of selling, we surely wanted to know it.
>
> Q. In other words, it was still an open question in the industry as to whether the basing-point system should be continued or maintained? A. Mr. Wooden, I have repeatedly said that I do not consider that there is a basing-point system in the cement industry in the sense that it has frequently been described, and, so far as I am concerned, so far as the Lehigh Company was concerned, our in-

terest in the work of the Marketing Research Committee was to have that committee shed whatever light it could on any phase of the marketing of our product so that we might have been able to have the best information we could for our guidance.

Q. You say there was no attempt to mold the minds of the professors who undertook that study? A. To the extent that conversations between people result in molding each other's minds, of course. I know that I, myself, have had several talks with the professors in which we have ranged over the whole field of marketing, both from the practical and theoretical standpoint.

Q. And in so doing you were not attempting to influence sales policies of any of your competitors? A. Not a bit of it. I was listening, in those discussions, as much as I was talking."[62]

[62] (R) Tr. 27300-01.

PART XII

THE NRA CEMENT CODE

[As noted in the Foreword to Appendix A, respondents have assigned error to the action of the Commission in receiving in evidence or giving any consideration or weight in making the Findings to all of the evidence digested in this Part. This includes all evidence except the post NRA evidence at pp. 2157-66.]

A. Preparation and Approval of the Code.

Following the passage of NIRA in May 1933, and immediately upon the reorganization of the Institute and the revision of its Articles for the purpose of increasing its representative character,[1] the newly constituted Board of Trustees took under consideration a Code of Fair Competition as originally drafted by counsel.[2] The Board adopted it subject to confirmation after it had been submitted to members of the industry through their respective district trustees for ratification.[3] The members of the industry within the next ten days held meetings in New York and Chicago in which they voted by districts. These meetings were open to all members of the industry and non-members of the Institute participated.[4]

The respective district trustees reported their criticisms and suggested revisions proposed at these district meetings.[5] These were discussed by the trustees at meetings

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[1] See Part X, Sec. A 3 b, pp. 1813-17.

[2] MacFarland, President of the Institute (R) Tr. 31106-08; Resp. Ex. 2173 A-E: Trustees' Meeting, 6/15/33.

[3] Resp. Ex. 2174 A-C; Com. Ex. 605 A-C: Trustees' Meeting, 6/16/33.

[4] Hartley, Sales Manager, South Dakota (R) Tr. 41539-40 (Com. Ex. 1228).

[5] Rooney, Vice President, Huron (R) Tr. 33665.

on June 27 and 28, 1933 and a revised code embodying many of the suggestions made by members of the industry was adopted.[6] At this meeting the Washington Contact Committee, composed of C. F. Conn, President of Giant, B. S. Smith, then President of Penn-Dixie, and L. T. Sunderland, President of Ash Grove, was appointed and charged with the duty of taking the Code as adopted to Washington for approval and report to the trustees in the event that the Code in its then form was rejected.[7] A further committee, known as the Control Committee, to supervise any further revisions of the Code, consisting of B. H. Rader, Vice President of Lehigh, R. B. Henderson, President of Pacific, and G. L. Hogan, President of Lone Star, was appointed.[8] An Executive Committee of the Board of Trustees was also appointed.[9]

The Washington Contact Committee submitted the Code as thus adopted by the trustees to the NRA on July 19, 1933. The Code as thus submitted provided in Article IX—"Method of Quoting, Market Stabilization", *inter alia*:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"a. *Except in cases where the Committee permits otherwise, all cement quotations and sales shall be F.O.B. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold F.O.B. plant, in the event land-grant rates may be availed of by the Federal Government in arriving at the delivered cost.*

b. No discrimination shall be made in prices, terms, and conditions of sale at the same time and

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[6] Com. Ex. 606 A-J.

[7] Com. Ex. 606 G-I.

[8] Com. Ex. 606 I.

[9] C. F. Conn, Chairman, G. S. Brown, R. B. Henderson, S. W. Storey, C. Struckmann, L. T. Sunderland, B. S. Smith.

place of delivery between purchasers or users in the same class and similarly situated.'"[10]

At an informal meeting with the NRA it developed that changes would have to be made. The Committee revised the draft embodying the NRA suggestions and presented it to the trustees on July 26.[11] The Committee conferred with NRA again on July 27 and additional revisions were made at NRA's suggestion and the Code as so revised was circulated in the industry. Criticisms and suggestions made by members of the industry were considered by the trustees on August 15 and 16 and a further revised draft was written.[12] The Contact Committee again conferred with NRA and received further suggestions and after further revision still another draft was adopted by the Board at its meeting of August 23 and 24.[13] Upon the filing of this revision on August 26, the NRA Administrator set September 15 as the date for the public hearing.[14]

In anticipation of this meeting, Conn, President of the Institute, wrote on August 31, 1933 to Sunderland, President of Ash Grove, and Young, President of Lehigh:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"The Washington Contact Committee in reviewing the procedure at the public hearing (date for which it is expected will be announced to-day), feels that it is important that preparations should be made in advance to reply to criticisms and objections which may be offered at the hearing from within or

[10] Com Ex. 556, pp. 6-7.

[11] Com. Ex. 607 A-G: Trustees' Meeting, 7/26/33.

[12] Com. Ex. 608 A to O: Trustees' Meeting, 8/15-16/33.

[13] Com. Exs. 609 A-H, 610 A-D: Trustees' Meetings, 8/23/33, 8/24/33.

[14] Resp. Ex. 125 A-D: Conn, *supra*, report to members, dated 11/23/33.

without the industry. *We therefore request that you gentlemen give consideration to the provisions in the Code and in the supplements thereto, relating to price control (including defense of the present level of prices) and the universal practice of quoting delivered prices only, so that you may be prepared to make a brief statement in support of any phase of this subject, if called upon to do so.*"[14a]

At the hearing all interested parties, cement manufacturers, cement dealers, cement users, labor representatives, and others, if any, who wanted to be heard, had an opportunity to state their suggestions and criticisms and thereafter the Contact Committee conferred constantly with representatives of various divisions of the NRA and also committees appointed by the Deputy Administrator composed of representatives of various groups interested in the cement industry as dealers, contractors and users.[15] The draft as further revised by these conferences was reported to the trustees at this meeting in Washington on October 25th[16] and 26th, and after some further amendments the trustees approved the Code as so revised.[17] General Johnson, as NRA Administrator, approved the Code and on November 3, 1933 transmitted it to the President for signature.[18]

The President affixed his signature on November 27 and the Code became effective December 5, 1933. The Contact Committee distributed copies of the Code to all members of the industry and was discharged on December 7.[19]

[14a] Com. Ex. 836-2 V.

[15] Reiter, General Manager, the Institute (C) Tr. 16978-80.

[16] Com. Ex. 612 A-E: Trustees' Meeting, 10/25/33.

[17] Com. Ex. 613 A-C: Trustees' Meeting, 10/26/33.

[18] Com. Ex. 557, p. 327.

[19] Resp. Ex. 1822: Undated letter, Contact Committee to members. Com. Ex. 616 A-D: Trustees' Meeting, 12/7/37.

Summarizing the manner in which the Code was drafted, the witness Porter, President of North American, testified:

> "Well, the board of trustees, either by itself, or through committees, and with the aid of Government officials, drafted the provisions of the Code; but those drafts were all taken back to meetings—to industry meetings, at which they were thoroughly discussed, and the board of trustees were given instructions as to how to proceed from there on."[20]

PROVISIONS OF THE CODE OF FAIR COMPETITION FOR THE CEMENT INDUSTRY AS APPROVED NOVEMBER 27, 1933, BY PRESIDENT ROOSEVELT[21]

ARTICLE I

PURPOSE

To effectuate the policies of Title I of the National Industrial Recovery Act, the following provisions are submitted as a Code of Fair Competition for the Portland Cement Industry, and upon approval by the President shall be the standard of fair competition for such industry, and shall be binding upon every member thereof.

ARTICLE II

DEFINITIONS

1. The term "Portland Cement Industry" as used herein includes the manufacture and sale by manufacturers of Portland Cement.

2. The term "employee" as used herein includes anyone engaged in the Portland Cement Industry, in any capacity, receiving compensation for his services, irres-

[20] (R) Tr. 33914.

[21] Com. Ex. 557.

pective of the nature or method of payments of such compensation.

3. The term "employer" includes any enterprise by whom any such employee is compensated or employed.

4. The term "member of the industry" as used herein includes any enterprise engaged in the industry as above defined.

5. The term "district" as used herein means the geographical producing district as now or hereafter designated by the United States Bureau of Mines or other Governmental Agency, or as may hereafter be determined by the Code Authority.

6. The term "productive capacity" as used herein shall mean the productive capacity of the industry as determined by the United States Bureau of Mines.

7. The term "Institute" as used herein shall mean The Cement Institute.

8. The term "Board" as used herein shall mean the Board of Trustees of The Cement Institute.

9. The term "plant" as used herein shall mean a Portland Cement Manufacturing Plant.

10. The terms "President" and "Act" and "Administrator" as used herein, shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of said Act.

Article III is devoted to the subject of labor.

ARTICLE IV

Administration

To effectuate further the policy of the Act a Code Authority is hereby constituted to cooperate with the Administrator in the administration of this Code.

A. *Organization and Constitution of the Code Authority*—The Code Authority shall consist of seven individuals, or such other larger number as may be approved from time to time by the Administrator, to be selected as hereinafter set forth. The President, in his discretion, may appoint not more than three additional members without vote to represent the Administrator.

1. The Board shall elect the Code Authority. The persons so elected shall, subject to changes at any time by the Board, serve on such Code Authority for such term as the Board shall determine.

The Board shall be made up as follows:

(a) One member to be chosen from each district.

(b) Trustees at Large, not to exceed seven (7) in number, shall be chosen by those members of the Board who represent the cement districts.

(c) The President, the Vice Presidents, and the Treasurer of the Institute shall be ex-officio members of the Board with full power to vote.

The members of the Board to represent the cement districts shall be elected by the members of the industry who participate in the activities of the Code Authority, as provided in Section B, subsection 8 below, in the respective districts by a majority vote of such members in each such district to serve for the term of one year and until their successors are elected and have qualified, and the members of the Board, so elected, shall elect the Trustees at Large; provided, however, that any member of the Board elected to represent any cement district may be recalled by a majority vote of the members of the industry in any such cement district in the event of the change in status of such Trustee or if, for any other reason, any such Trustee is not considered to be representative of the members of the industry in such district and, in the event of such recall, such members shall elect, by a majority vote, a Trustee

to fill the unexpired term of the Trustee who has been recalled; a majority of the members of the Board shall have like power with respect to any Trustee at Large.

In the event of a vacancy in the Board, such vacancy shall be filled for the unexpired term of the Trustee whose vacancy is to be filled in the same manner as such Trustee was elected a member of the Board.

In the event of the inability of any Trustee elected to represent a cement district, or of any Trustee at Large to attend any meeting of the Board or of the Institute or of any committee or committees thereof, the members of the industry in such district, with respect to Trustees representing cement districts and the other Trustees at Large, with respect to any such Trustee at Large, shall have the right, from time to time as the occasion may require, to elect an Alternate Trustee to attend any such meeting or meetings who shall have such authority to represent the members of such district or to act as Trustee at Large as may be prescribed by such members or by such other Trustees at Large. Within the limits of the authority conferred upon him, as herein provided, any such Alternate Trustee shall have the right to vote and to act in all respects in the place of the member of the Board whose place he fills.

2. The Institute or its successors or any trade or industrial association participating in the selection or activities of the Code Authority, shall:

(1) Impose no inequitable restrictions on membership;

(2) Submit to the Administrator true copies of its Articles of Associatoin, By-Laws, Regulations, and any amendments when made thereto, together with any other information relating to membership, organization, and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

(3) In order that the Code Authority shall at all times be truly representative of the industry, and in other respects comply with the provisions of the Act, the Administrator shall provide such hearings as he may deem proper; thereafter if he shall find that the Code Authority is not truly representative, or does not in other respects comply with the provisions of the Act, he may require an appropriate modification in the method of selection of the Code Authority.

B. *Powers and Duties of the Code Authority*—In addition to the powers and duties herein specifically conferred upon the Code Authority, it shall have the following duties and powers to the extent permitted by the Act and subject to the right of the Administrator by review to disapprove or modify any action taken by the Code Authority pursuant to this Code.

1. The Code Authority shall be the general planning, coordinating, and administering agency of this Code. It may make such rules and regulations as may be necessary for the conduct of its business in the administration of this Code.

2. The Code Authority may designate the Institute or such other committees or agents, and may delegate to them such of its powers as it may deem necessary for the administration of this Code; provided, however, that the Code Authority shall not be relieved of final responsibility with respect to any such delegated powers.

3. The Code Authority shall, upon complaint of interested parties, upon request of the Administrator, or upon its own initiative, make such inquiry and investigation as to the operation and observance of this Code as may be necessary and report the results thereof to the Administrator for such action by him as may be in accordance with law.

4. No member of the Code Authority or of any committee designated by it shall participate as such member in a proceeding in which he is interested, either as complainant or as respondent, or in which he is in any other manner directly interested; and in the event of any such disqualification, the remaining members of such Code Authority or committee shall certify such disqualification, together with the reasons therefor, to the President of the Institute, who shall promptly designate a person to sit as a special member of such Code Authority or committee for the purposes of any such proceedings; provided, however, that any such special member so appointed shall be selected from the same group of the industry as is represented by the member whom he replaces.

5. In order that the President may be informed of the extent of the observance of the provisions of this Code and of the extent to which the declared policies of the National Industrial Recovery Act are being effectuated in the industry, the Code Authority and members of the industry shall make such reports as the Administrator may require periodically or as often as he may direct. Each member of the industry shall make such sworn or unsworn reports to the Code Authority or to such agency as it may designate as to wages, hours of labor, number of employees, and such other matters as the Code Authority may require for the administration of this Code; provided, however, that any information furnished hereunder of a confidential nature as between competitors in the industry shall not be available to competitors nor published in such form as shall reveal the identity of any member of the industry furnishing such reports.

In addition to the information required to be submitted to the Code Authority, there shall be furnished to governmental agencies, such statistical information as the Administrator may deem necessary for the purposes recited in Section 3(*a*) of the Act.

6. Any interested party shall have the right to complain to the Code Authority under such rules and regulations as it may prescribe in respect of any rule, regulation, order or finding made or course of action pursued by the Code Authority, and any interested party shall have the right to appeal to the Administrator under such rules and regulations as he may prescribe in respect to any decision, rule, regulation or course of action of the Code Authority, pursuant to any provision of this Code.

7. The Code Authority and/or the Board may, from time to time, make such recommendations to the President as it may deem advisable or necessary to effectuate the policy of the Act and to develop and maintain conditions of fair competition in the Industry; and any modification or additions to this Code recommended by the Code Authority and/or the Board shall, upon approval by the President, become part of and shall have the same force and effect as other provisions of this Code.

8. Any member of the Industry shall be entitled to participate in and share the benefits of the activities of the Code Authority, and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and by either paying his reasonable share of the expenses of its administration or by becoming a member of the Institute. The reasonable share of expenses of administration shall be determined by the Code Authority subject to review by the Administrator on the basis of volume of business and/or such other factors as may be deemed equitable to be taken into consideration.

ARTICLE V

Safety Work (Omitted)

ARTICLE VI

Plan for Sharing Available Business

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2126.

ARTICLE VII

Increase in Productive Capacity

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2151.

ARTICLE VIII

Cost Protection

This article is dealt with in relation to the subject matter thereof, *infra*, p. 2124.

ARTICLE IX

Open Price—Market Stabilization

This article is dealt with in relation to the subject matter thereof, Part III, *supra*.

ARTICLE X

Unfair Competition

For the purposes of this Code, the following acts shall constitute unfair trade practices and a violation of this Code:

1. Making or promising any bribe, gratuity, gift, or other remuneration, not filed and published in accordance with Article IX hereof, directly or indirectly to any purchaser or prospective purchaser, or to any officer, employee, or representative thereof,

for the purpose or with the effect of making a sale of cement; imitating any brand or trademark used by any competitor; inducing or attempting to induce in any manner the violation of any existing future sales order or future sales contract, or other existing contract between a member of the industry and his customer, with the purpose or effect of inducing or causing a breach of any such contract; circulating or disseminating false or misleading information by words or acts relative to the prices, credit standing, business integrity, or ability to perform contracts, of any competitor or the grade, quality, count, character, nature, origin, manufacture, weight, or preparation of his products.

2. To compensate salesmen in any manner other than upon a fixed salary and full-time basis.

[Italicized part quoted in Fdgs. Par. Twelve (b)]

3. *To divert or permit purchasers or users of cement to divert shipments of cement from one destination to another destination, the result of which will enable the purchaser or user to secure cement at less than the member of the industry's published market price at the point of final destination.*

4. The following practices, undertaken for the purpose or with the effect, directly or indirectly, of furthering the sale or use of a particular brand of cement shall constitute unfair trade practices and a violation of this Code:

(a) Except with permission of the Code Authority (and such permission, when given, shall apply to all companies in the marketing area affected) the purchase, by any member of the industry, of bonds, or other securities, issued for the financing of constructive work, either in the name of the member of the industry, its subsidiaries, or of individuals, or officers, connected therewith, or the acceptance of such bonds, or other securities, in payment, wholly or in part, for cement, or the advance, loan, or payment of any monies by a member of the industry for the purpose of inducing the purchase of cement, or to assume cost of Bidders' Bonds or to endorse or guarantee or in any way relieve a Bidder of the

responsibility for or the expense of providing such bonds; unless such conditions shall have been filed and published in accordance with Article IX.

(b) For the purpose or with the effect of evading the provisions of Article IX of this Code, the purchase of fuel or other supplies, either directly or indirectly, or in the name of the company, or its subsidiaries, or of individuals, or officers connected therewith at prices above the market price thereof at the time of purchase.

(c) To make or permit to be made, either directly or indirectly, any secret payment or allowance of rebates, refunds, commissions, credits, or unearned discounts in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers on like terms and conditions.

(d) The prepayment of transportation charges on shipments consigned to other than the member of the industry itself, except in the case of railroad freight charges to stations to which regulations require prepayment from any shipping point, or the payment of demurrage charges by any member of the industry on such shipments; provided, however, that the foregoing provision, except as to demurrage charges, shall not apply to shipments purchased directly by and consigned to departments of the United States or State Governments, unless such conditions shall have been filed and published in accordance with Article IX.

(e) Knowingly diverting or permitting to be diverted to other uses, cement shipped for a specific work project nor knowingly shipping on a specific work order or contract, an amount of cement in excess of the actual needs of such work.

(f) To entice maliciously the employees of a competitor with the intent or effect of interfering with the conduct of the business of such competitor.

(g) Knowingly to ship cement by any transportation agency which, for the purpose or with the effect of inducing or influencing the sale or purchase

of cement, makes payments or concessions by rebates or otherwise.

(h) The payment, or offer to pay, directly or indirectly, any advertising expenses of purchasers or users of cement.

(i) Lavish, excessive, or undignified entertainment of purchasers or users of cement, or others connected therewith; donating funds, or providing banquets or other similar lavish entertainment for purchasers or users, or associations thereof; giving or offering to give premiums, personal gifts, gifts of cement, or gifts of any other commodity of substantial value to purchasers or users of cement.

(j) The sale by any member of the industry, directly or indirectly, of any commodity at a discriminatory price.

(k) Services to purchasers or users are proper under fair competition, if confined within the limits of advice and consultation. The furnishing of articles or facilities of a definite physical nature, whether by way of loan, lease, gift, or otherwise, resulting in monetary benefit to purchasers or users is discriminatory and shall constitute unfair competition.

(l) No member of the industry shall maliciously refuse to sell to, or maliciously interfere with the business of, dealers or users of portland cement purchased from a competitor, for the purpose of interfering with the conduct of the business of such competitor.

ARTICLE XI

Method of Selling and Marketing Cement

This Article is dealt with in relation to the subject matter thereof, *infra*, Part XIV, Secs. B and C.

ARTICLE XII

Terms and Conditions of Sale

This Article is dealt with in relation to the subject matter thereof, Part XV, *infra*.

ARTICLE XIII

Standardization of Products

This Article is dealt with in relation to the subject matter thereof, Part I, *supra*, pp. 25-26.

ARTICLE XIV

It is the concensus of opinion of the industry that each member thereof should bear his proportionate share of the burden of the cost of constructive cooperative activities approved and supported by the majority of the Industry and whose benefits are common to all manufacturers.

ARTICLE XV

Nothing in this Code contained, excepting, however, the provisions of Article III, shall be deemed to apply to or affect the sale by any member of the industry of any products of the industry for direct shipment in export trade.

ARTICLE XVI

Modification

1. This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provisions of subsection (b) of Section 10 of NIRA from time to time to cancel or modify any order,

approval, license, rule or regulation issued under Title I of said Act and specifically but without limitation to the right of the President to cancel or modify his approval of any provision of this Code or any conditions imposed by him upon his approval thereof.

2. Whenever the Administrator shall determine such action by him to be necessary to effectuate the policy of the Act, he may modify or cancel any action pursuant to this Code by any agency established thereunder.

3. Except as to the provisions required by the Act, this Code may be modified on the basis of experience or changes in circumstances, such modifications to be based upon application to the Administrator, on such notice and hearing as he shall specify and to become effective on approval by the President.

ARTICLE XVII

Monopolies

No provision of this Code shall be so construed or applied as to permit or promote monopoly or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

ARTICLE XVIII

Effective Date

The effective date of the Code shall be ten days after approval thereof by the President.

The Suspension of Article XI

Shortly after the approval of the Code, objection to Article XI of the Code dealing with the classification of purchasers was made by a number of dealers and dealer organizations. A hearing was held thereon and part of this

Article relating to the classification of purchases was ordered suspended.[22] In explaining the action taken, Reiter, who at the time was Secretary of the Code Authority, testified:

> "There are 90 cement manufacturers in the United States, and there are 30,000 dealers. And they had a lot more influence than we did. And the Administrator after this hearing just ordered that it be suspended."[23]

> "Yes, they thought at that time that they could do a better job of selling State governments than we could, although that was another thing.
>
> To make this plain, Mr. Wooden, there was a long period of discussion between the dealers' code authority and the cement code authority.
>
> Their original position, which seemed to me to be that they wanted to handle all of the cement sold, gradually was changed, so finally they seemed to be about willing to take, or accept a marketing practice as was originally specified by Article 11. By that time May 27, 1935, had arrived."[24]

Amended Code of May 21, 1935

The minutes of the meeting of the Code Authority on May 14-15, 1934 record:

> "There was read a draft of a proposed amended Article XI prepared by Mr. Sunderland from suggestions received by the Code Authority from members and groups of this Industry and from a Committee of the Builders Supply Industry. During the reading of this draft many comments and suggestions for changes were made, and at the conclusion of such reading the Chairman was instructed to proceed with the preparation of a completed draft of Article XI."[25]

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[22] Reiter (C) Tr. 4264, *infra*, p.

[23] Reiter (C) Tr. 4266.

[24] Reiter (C) Tr. 4267. See also *infra*, p.

[25] Com. Ex. 559 C: Code Minutes, 5/14-15/34.

Apparently as a result of this activity, the NRA Code Administration called a meeting on July 11, 1934, and gave public notice thereof, inviting all who wished to be present to discuss revisions of the cement code. The Code Authority appeared and presented a statement.[26] The matter continued under discussion until April 1935. A revision entitled "Amendment to Code of Fair Competition for the Cement Industry as Approved of May 11, 1935"[27] became effective as of May 21, 1935, six days before the *Schechter* decision.

The provisions of this revision elaborated the Article dealing with labor, extending it to three separate Articles. The provisions as to the Code Authority were elaborated but not essentially changed. Members, however, were required to keep accurate and complete records of transactions to show compliance with the provisions of the Code and furnish accurate reports when required by the Code Authority or the NRA.

A provision was introduced under which any member of the Industry might agree with any other member of the Industry that in case one was aggrieved by any violation of the Code on the part of the other, the matter should be settled by the payment of liquidated damages, provided that such agreement should be effective only after submission to, and consent of, the NRA.

[Italicized part quoted in Fdgs. Par. Thirteen (f)]

A provision was introduced requiring members of the Industry to file with an agent of the Code Authority "copy of every contract or order by which he sells or undertakes to sell products of the industry," and, [*"Upon receipt of such filed orders or contracts the agent of the Code Authority shall send digests thereof to all interested members of the Industry."*][28]

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[26] Com. Ex. 598 G-L: Members' Minutes, 7/10/34.

[27] Com. Ex. 560.

[28] Com. Ex. 560, p. 15.

The Articles as to a plan for sharing available business, filing petitions objecting to construction of new plants and selling below cost were omitted, as well as that part of the Article previously cancelled dealing with the distinction between different classes of purchasers and those who are to be sold direct and those who are to be sold through dealers.

The Articles as to trade practices and methods of selling and marketing cement, terms and conditions of sale, and standardization of products, were maintained in substance, although the language was altered and the provisions were elaborated, and, in many cases, more detailed.

Since, however, this Revised Code was in effect for only six days, consideration of its terms and the method of its enforcement were not subjects of testimony.

B. The Code Authority and The Cement Institute.

The Code Authority was established by Article IV of the Code to be composed of seven persons appointed by the Trustees of the Institute, charged with the duty of planning for the industry and insuring the equitable administration of, and compliance with, the Code of Fair Competition, as approved by the President.[1]

Pursuant to this authority, the Trustees, at their meeting of December 7, 1933,[2] elected B. H. Rader as Chairman, R. B. Henderson, C. L. Hogan, J. B. John, G. F. Coffin, M. C. Monday, and L. T. Sunderland[3] to compose the Code Authority.

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[1] Com. Ex. 557, pp. 330-333.

[2] Com. Ex. 616 A-D: Trustees' Meeting, December 7, 1933.

[3] Of this original Code Authority, all were at the time of their election Institute Trustees. Lucas, who replaced Henderson, was not a Trustee, but Neylan, who replaced Hogan, was a Trustee.

On February 21, 1934, Henderson resigned because of ill health and was replaced by E. P. Lucas,[4] and on July 10, 1934, J. F. Neylan was elected to serve in place of C. L. Hogan during the latter's absence.[5]

On November 20, 1934, a new Code Authority, composed of G. H. Reiter, Chairman, G. E. Warren, F. M. Coogan, E. P. Lucas, J. F. Neylan, L. T. Sunderland, and S. W. Storey, were elected.[6]

The relation between the Code Authority and the Institute was established by the Code itself and amplified by regulations issued by the National Recovery Administration. The NRA, on May 29, 1934, issued a clarification of the relation between Code Authorities and Trade Associations, stating, among other things:

> "A Code Authority is an entity, separate and distinct from a Trade Association and its governing body, even though, so far as industry representation thereon is concerned, may have the same personnel.
>
> * * * The most effective Code Authorities make the greatest use of the available facilities of their Trade Associations, though not duplicating facilities for necessary services (such as, statistics, accounting, investigation, publication, standards, grades, etc. etc.) where they are available in the records of the Trade Associations.
>
> Provisions may be made in the By-Laws of the Code Authority for the utilization of the facilities and personnel of a Trade Association, and the Code Authority may pay for the cost of using such facilities for Code activities.
>
> In any such case the Trade Association should be under such regulations and subject to such super-

[4] Com. Ex. 618 A-H: Trustees' Meeting, February 21, 1934.

[5] Com. Ex. 598 A: Secretary to Members, dated July 12, 1934.

[6] Resp. Ex. 1823 B: Trustees' Meeting, November 20, 1934. Of the second Code Authority only Storey and Lucas were Trustees.

vision as to insure fair and effective Code Administration, and avoid discrimination and the appearance of discrimination against non-members of the Association.

The Secretary of a Trade Association may also be the Secretary of the Code Authority providing he is able to do so without inconvenience. His duties are separate and distinct and should be kept so. In carrying out his functions as Secretary of the Code Authority he is solely responsible to the Code Authority. In functioning as an Association Secretary he is solely responsible to the Association. A paid employee or organization under the Code Authority or of a Trade Association, may be designated as the Statistical Agency for the Code Authority if the Code Authority takes the necessary steps to insure his impartiality.

Code Authorities may not use funds collected from members for the promotion of the Industry. Such monies raised as contributions of the Code Authorities are to be expended solely in the administering of the Code * * *."[7]

Reiter, Secretary of the Chicago Division, when the Code went into effect, and also Secretary and later Chairman of the Code Authority, testified that the expenses of the Code Authority and of the Chicago Division of the Institute were very carefully separated. Office rental, expenses and all salaries (including his own) were prorated. Code Authority expenses were met by an assessment upon all members of the industry approved by NRA.[8]

Examined as to the difference between the activity of the Code Authority and the Institute, Reiter testified:

"Q. What were the things which the Institute was doing during that period that the Code Authority was not doing? A. Bearing in mind that this was a division office of the Institute, it handled the filing

[7] Resp. Ex. 170 A-B.

[8] (C) Tr. 2801-02.

and checking and dissemination of contract information. Do you want me to describe that in detail?

Q. No, just cover the various activities or functions which the Institute was performing at that time. A. That activity required most of the work of the Institute office itself and occasioned most of its costs. Another principal activity was the issuance and servicing of freight rate books in a certain area of the country, there being another freight rate bureau in another part of the country, which handled part of that work.

Q. The price filings, so-called, were a code authority activity, were they not? A. Yes, sir."[9]

And again:

"Q. Mr. Reiter, were there any activities of the Cement Institute which were temporarily discontinued by it during the code period and which were assumed during that period by the Code Authority? A. I am sure there were not.

Q. Had the Cement Institute any system of filing prices before the time of the Code? A. No.

Q. What new functions or activities, then, did the Code Authority assume that had not been previously carried on by the Institute? A. Well, the Code Authority was, of course, the administering body for the Code and they worked at that job. They did follow a lot of activities which were not related at all to those of the Cement Institute.

Q. Did the Cement Institute have a code of ethics? A. Yes.

Q. Prior to the time of the NRA Code? A. Yes.

Q. Were some of the provisions of the code of ethics included in the NRA Code? A. I cannot answer that, Mr. Wooden. I do not know.

Q. If that should be the case, then the Code Authority would be administering some things which the Institute previously had had in its code of ethics to handle? A. I do not know how to answer that question.

[9] (C) Tr. 2803-04.

Q. It all depends on whether the NRA Code included provisions of the former Institute code, does it not? A. If the Code, as approved by the NRA, was identical with the code which was adopted by the Institute back in 1929 and if the Cement Institute attempted to administer that former code, none of which is a fact, then it would be true. (Laughter)."[10]

Upon the termination of the Code, the trustees passed a resolution instructing the Treasurer to defray the expenses incurred for Code purposes on or before May 27, 1935 out of Code funds[11] and subsequently the Secretary of the Institute sent to all members an accounting of the Code Authority income and expenses from December 7, 1933 to June 16, 1935.[12]

C. NRA Code Activities.

Introduction

The Code placed certain duties upon, and authorized certain activities by, the Code Authority and authorized other activities by the Institute beyond those incident to its purposes as declared in its Articles.

In this section, following evidence as to enforcement of the Code, the evidence is digested as to activities of the Code Authority under Article VIII of the Code—Cost Accounting—and as to activities of the Institute authorized under Articles VI and VII of the Code—Plan for Sharing Available Business and Opposition to New Plants.

Code Authority activities under Article IX of the Code dealing with open price filing are covered in Part III, *supra*, and activities under Article XI dealing with the method of selling and marketing cement are covered in Part XIV, *infra*, Secs. B and C.

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[10] (C) Tr. 2815-16.

[11] Resp. Ex. 172 B.

[12] Resp. Ex. 173 A, B.

These activities were closely examined by Counsel for the Commission, apparently to disclose the "state of mind"[1] of the respondents in accordance with his theory that the Code Authority was the "creature and tool"[2] of the Institute, and his supposition that what the industry was invited, allowed or ordered to do under NRA was what its members desire and strive to do today.

1. Enforcement of the Code

During the effective period of the Code, the Code Authority received specific complaints against various members of the industry. These were investigated and reported in accordance with the duty imposed upon the Code Authority by Article IV B 3, *supra*, p. 2107, and the regulations relating thereto promulgated by the Administrator in a general bulletin to Code Authorities issued in January 1934.[1]

It was the Code Authority's practice to handle these almost entirely through correspondence. If upon investigation it reached the conclusion that a violation of the Code had occurred, it then referred the entire file to the NRA Compliance Division for such action as that agency cared to take.[2]

Evidence relative to the Code Authority's handling of complaints and violations in connection with open price filing under the Code is set forth under Part III, F, *supra*.[3]

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[1] (R) Tr. 37192-93.

[2] (C) Tr. 3173.

[1] Resp. Ex. 182: NRA Bulletin No. 7, "Manual for Adjustment of Complaints".
Reiter, Chairman, Cement Code Authority (C) Tr. 17044-49.

[2] Reiter, *supra*, Tr. 17044-45.

[3] Resp. Ex. 183: Code Authority Bulletin No. 1.
Reiter, Chairman, Cement Code Auth. (C) Tr. 17044-49.

At a meeting of the Code Authority on May 14-15, 1934 in San Francisco,[4] the Authority had before it a telegram stating that General Johnson had requested an expression from the Code Authority as to the constructive gains accomplished through cooperation under the Code. Upon motion made and unanimously carried, the Code Authority replied:

> "Operation our Code has been disappointing to members of our Industry for reason that NRA has not cooperated with Code Authority in enforcement and prosecution of violators upon information developed by our investigations. If NRA will require observance our Code by prosecution of violators results will be beneficial to employees, public and members this Industry."

2. Cost Accounting.

Article VIII of the Code provided:

> "1. It shall be an unfair method of competition for any member of the industry to sell or offer to sell cement at less than his expenses of manufacture, provided, however, that any member of the industry may sell or offer to sell cement at below his own expenses to meet the competition of any other member of the industry whose price is not less than the expenses of manufacturing of such other member."

The Article follows with a method of determining the per unit manufacturing expense to be used as a criterion by every member of the industry. It then provides for the investigation and report upon the accounting of any member who is complained of as selling in violation of the Article. The final paragraph of the Article provides:

> "3. *Uniform Cost Accounting.*—The Code Authority shall prepare and adopt for general use throughout the industry, and submit to the Adminis-

[4] Com. Ex. 559 A-C.

trator for approval within thirty (30) days of the effective date hereof, a standard method or system of uniform cost accounting which shall specify all items and include all elements of manufacturers' cost. When so prepared, adopted, and approved, all members of the industry shall apply the principles and include all the elements thereof in determining their respective costs."[1]

In anticipation of this provision the Trustees of the Institute had submitted a manual of uniform cost accounting to the Code Authority in December 1933. It developed that this manual was not satisfactory to all members of the industry and the Code Authority directed its Chairman to appoint a committee of auditors from the industry to suggest modification of the manual and submit their report to the Code Authority.[2] The committee so appointed prepared a revised manual. The Code Authority approved the manual and secured the approval thereof by the NRA Administrator. The introduction to this manual states:

> "In compliance with the requirements of Article 8, Section 3 of the Code of Fair Competition for the Cement Industry the Code Authority has prepared, adopted and presents for general use throughout the industry, a Standard System of Accounting which specifies all items and includes all elements of manufacturers' costs."[3]

The book thus introduced was distributed to all members of the industry, to many outside the industry and to certain officers of the NRA.[4]

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[1] Com. Ex. 557.

[2] Com. Ex. 629 A-C.

[3] Resp. Ex. 184: Manual of Accounting for the Cement Industry—1934.

[4] Reiter, Chairman, Cement Code Auth. (C) Tr. 17054.

Reiter testified that the Code provision against sales below cost was not enforced.[5]

The company representatives who testified in answer to questions as to whether they used this manual said that they did not.[6]

3. Plan for Sharing Available Business

The first draft of the Code included authority for the development and use of a plan for sharing available business.[1] This was the subject of a great deal of discussion and criticism during the Code drafting period from June to October, 1933. Northern California companies felt that special consideration must be provided for Pacific coast problems in any plan for production control.[2] District meetings developed distinctive ideas of their own.[3] Pittsburgh criticised proposals for determining the percentages as unfair to more modern and up-to-date plants.[4] Marquette claimed that such a plan would be contrary to public policy, impractical, unfair and arbitrary.[5] Aetna expressed the opinion that smaller companies could not expect much altruism from larger companies on the matter of curtailment. It expressed the fear that the dormant capacities

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[5] Reiter, Chairman, Cement Code Authority (C) Tr. 17054.

[6] Southwestern: Warren, G. E., Vice President (R) Tr. 29208-10.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36509.
Missouri: Alexander, President (R) Tr. 37165.
Hawkeye: Manley, General Manager (R) Tr. 41817.

[1] Com. Ex. 556.

[2] Com. Exs. 1227-1230: Circular letter with enclosures from McCarthy, dated 6/22/33.

[3] Com. Ex. 637 A-F: District Meeting Minutes, 6/22/33.
Com. Ex. 828-6 T-7 H: District Meeting Minutes, 6/23/33.

[4] Com. Ex. 821-3 Y-3 Z: Letter dated 6/23/33, Galt, Vice President, Pittsburgh to Coffin, Vice President, Nazareth.

[5] Com. Ex. 2603 A-F: Marquette letter, dated 8/9/33.

of big mills would work to the disadvantage of small companies and that the plan tended to develop monopoly.[6]

Young, President of Lehigh, in a letter dated August 30, 1933 to Coffin, President of the Institute, while the discussion of the Code was still in progress, set forth the necessity for a plan for stabilizing production as part of any plan undertaken for the stabilization of prices and the payment of better wages and the employment of more people during the depression. The letter said:

> "Before attempting to answer your recent request for a personal opinion as to why the article on 'Control of Production and Distribution' is an essential part of the Cement Code, I should like to preface my remarks by reiterating that, in my opinion, price control is more essential to market stabilization than control of production. As between curtailment and price observance I would always choose price observance. Although I am convinced that a quota system will not in and of itself stabilize the market, I am quite willing to admit that, if there is absolute price control, some method of equitable distribution must be developed to insure proper protection for the weak.
>
> Industry has been requested by the Federal Government to cooperate in a nation-wide campaign against depression. The important objective is the re-employment of millions of men now out of work. The increase in employment is to be brought about by shorter hours of labor. In order to provide proper compensation for the shorter period of work, higher wage rates per hour have been proposed. Higher wage rates materially increase the cost of production. To offset increased cost of production there must be commensurate increase in price. An increase in

[6] Com. Ex. 86 A-C: Letter dated 8/17/33, Cree, Sales Manager, Aetna to Johnson, President, Aetna.
Com. Ex. 87: Aetna memorandum "Referring to the Plan for Sharing Available Business."

price cannot be of benefit unless safeguards are set up to insure its maintenance.

* * * * *

To summarize, the cement industry in order to cooperate with the NRA must have price stabilization. The weaker companies will not yield what has long been considered an inherent right to cut the price without receiving some consideration in return. The price they set on stabilization is control of distribution.'"[7]

Article VI of the Code as adopted provided:

"The Board (of the Institute) is hereby authorized to formulate a plan or plans * * * for the equitable allocation of available business among all members of the industry or among members of the industry operating in one or more Districts, and for the control of cement inventory and to submit the same either to a meeting of all members of the industry or to meetings of members in the Districts affected, as the Board may determine, for approval, modification or rejection. Each member of the industry shall be entitled to receive notice of any such plan and to participate in any meeting or meetings of all members of the industry or of members in the District in which such member operates and, further, shall have the right to appear before the Board at any meeting at which any such plan is being considered for the purpose of presenting any facts or arguments relative thereto.

When any such plan shall have been formulated by the Board, the Code Authority shall present the same to the Administrator for consideration and the Code Authority shall represent the industry and the Board in conference with the Administrator with respect to any such plan; provided, however, that as regards any such plan the Code Authority shall have only such power to bind the industry or any subdivision thereof as shall have been conferred upon it by majority vote of the industry or of any subdivision thereof, and each member shall have the right to present his objections, if any, to the Ad-

[7] Com. Ex. 836-2 X-Y.

ministrator. The Code Authority shall collect and present to the Administrator such data and statistics as may be required in connection with any such plan together with a statement of the names of those members of the industry that approve and of those that disapprove such plan in whole or in part.

Any such plan shall be based on the following principles:

(a) It shall be fair and its benefits shall be equitably apportioned to all plants.

(b) It shall give due consideration to all pertinent factors including demonstrated productive capacity based on the clinker and/or cement production performance of non-obsolete plants and equipment.

(c) It shall in no way reduce the total production of all plants below what is necessary amply to supply demand.

(d) It shall not promote monoply or monopolistic practices or oppress small enterprises."

The Article provided that such plan should become operative only upon the approval of the NRA Administrator after hearings at which the Code Authority should represent the industry and providing that any member of the industry might be heard at such hearing.[8]

THE COFFIN COMMITTEE PLAN

In anticipation of the approval of the Code, the Trustees on October 26, 1933, directed Mr. Coffin to act as chairman of a committee of five, four other members to be selected by himself, for the study of a plan for sharing business and report to the Board.[9] Mr. Storey reported to the Trustees

[8] Com. Ex. 557, Article VI.

[9] Com. Ex. 613 B: Trustees' Minutes, 10/26/33.
Coffin appointed, C. L. Hogan, C. B. Condon, A. B. Henderson, and S. W. Storey as the other committee members (Com. Ex. 615 E).

at their meeting[10] on December 5, 1933 that this committee recommended the application of the following general principles to a plan for sharing available business, namely:

> 1. "That any plan should be predicated upon the principle that all clinker production allocated to each separate plant must actually be produced at that plant only.
>
> 2. That the productive capacity of each plant be determined by applying the Bureau of Mines formula to clinker production; namely, using the highest consecutive three months' clinker production reduced to a daily average and multiplied by 365 days, during any period of time from January 1, 1927 to January 1, 1933.[10a]
>
> 3. That the distribution of each plant's capacity shall be based on its own average annual shipments into the district or districts to which shipments have been made during the same six years, namely, January 1, 1927 to January 1, 1933.
>
> 4. That each plant's percentage of shipments be proportionate to the ratio of that plant's capacity to the total capacity of the district or districts against which its capacity is changed."

At the Trustees' meeting two days later, on December 7, the Chairman asked if they were ready to vote on the plan. The question precipitated discussion resulting in a motion to reorganize the committee by substituting new members for those who had been elected to the Code Authority.[11]

Article VI of the Code, as quoted above, declared that any plan should give due consideration to "demonstrated productive capacity based on the clinker and/or cement pro-

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[10] Com. Ex. 615 C-E: Trustees' Minutes, 12/5/33.

[10a] Mallory, the Institute's Statistician, testified that he originated the idea of a capacity formula based on the three highest consecutive months of actual clinker production (G) Tr. 17393-94.

[11] Com. Ex. 616 C-D: Trustees' Meeting, 12/7/33.

duction performance." W. S. Mallory, the Institute's statistician, advocated clinker production as the yardstick.

Writing to Porter, President of North American, on October 11, 1933, Mallory said:

> "I fully realize that using the existing clinker capacity of each plant as the yardstick to measure the production and distribution of cement so that each plant can know its monthly position in relation to the total production and shipments of its district is not entirely fair to all plants now. At the time this plan was suggested, it seemed to be the best plan based on the information then available, but if it is going to be possible, under the code, to obtain more complete and accurate information about the historical records of each plant, I feel certain that a more equitable yardstick can be found."[12]

* * *

In a memorandum dated November 8, 1933 he said:

> "I still believe that the historical clinker production record should be used to establish the estimated capacity of each plant for the reason that, except for a few exceptions which should be adjusted, practically every plant has operated to its full capacity in some three months' period during the past six years.
>
> Some executives think that shipments should be used in whole or part in estimating the plant capacity, but I do not agree with this for, if the shipments from each plant for the past six years were used as a part of plant capacity instead of clinker, it would give an unfair advantage to thirty-three plants. I, therefore, suggest that we use the present method of estimating the plant capacity on clinker alone and that each plant be estimated as a separate unit."[13]

This yardstick appears in par. 2 of the plan, above.

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[12] Com. Ex. 550 P.

[13] Com. Ex. 844 D.

THE STOREY COMMITTEE PLAN

The newly appointed committee, under the chairmanship of Storey, with the assistance of Mallory, proceeded with the preparation of a detailed plan, including the assignment of quotas for each mill in the industry. This, referred to as the Storey (or Mallory) plan, was submitted to the Trustees at their meeting on February 21, 1934.[14] After some amendment they approved the plan on the following day, with direction that it be submitted to the members of the industry.[15] The plan as so submitted was to operate as follows:[16]

> (a) Capacity figures to be arrived at by method recommended by Coffin Committee except that the period ran from January 1, 1925 instead of January 1, 1927. Such capacities to be calculated at the beginning of each calendar year and, once approved by Code Authority, not to be changed during the calendar year except that during 1934, Code Authority might adjust the capacity and quota figures of any mill making a better three-months record up to October 1 than that in which its rating had been based.
>
> (b) Capacity of each mill to be allocated at beginning of year to the various Bureau of Mines Districts into which it had shipped in proportion to its own shipments into such districts during the three preceding calendar years. If mill had not shipped during preceding year, then the capacity was to be allocated in proportion to such mill's shipments into the several districts during the last year that shipments were made from that mill.
>
> (c) Each mill to notify Code Authority within 31 days from effective date of plan or of beginning of calendar year whether or not it was going to op-

[14] Com. Ex. 618 E: Trustees' Meeting, 2/21/34.

[15] Com. Ex. 618 G.

[16] Com. Ex. 2917 A-T.

erate during the current year. If it elects to operate, its quota was to be computed by applying to the consumption of cement in each district the same percentage as that mill's percentage of the total capacity of such districts determined as in (b) above.

(d) Mill electing not to operate was to be entitled to ship only ½ the amount as determined under (c) above from other mills, such mill to reduce its established capacity by 50% and to return to the district or districts to which its capacity had been allocated, the remaining 50% of its capacity.

(e) Mill electing not to operate to be permitted at any time during calendar year to buy not more than the amount of cement to which it is entitled under (d) above from other mills, such sales to be made at price not lower than 10¢ per barrel below the average mill net received by seller during three months prior to date of purchase and cement so sold not to be included in selling mill's quota.

(f) Overshipped operating mill to be permitted at any time during calendar year to buy from undershipped operating mill located in same or adjoining district. Amount so sold and shipped to be included in shipments to which the selling mill was entitled for the year in which sale was made. Price on such sales to be 25¢ per barrel less than average per barrel mill net received during three preceding calendar months by the buyer at the mill for the account of which cement is purchased.

(g) At close of each year, adjustment was to be made by districts of all shipments over and under each mill's pro rata share. Method of adjustment is set out in detail.

(h) If mill ships more than 5% in excess of quota, such overshipments were to be considered a violation of Code subject to penalty of 50% per barrel on all shipments in excess of 105%, payable to the Code Authority and to be used to defray its current expenses.

The plan was considered in district meetings and variously criticized.[17] Individual companies criticized the plan.[18]

Beck, President of Great Lakes, writing on March 1, 1934 to Young, President of Lehigh, stated that the plan proposed was unfair to the companies that had maintained fair practices during the depression, stating:

> "Under the present arrangement, such plants as Standard, West Penn, Marquette, Wabash, Allentown and others, who have been absolutely unfair in the past, are being rewarded for grabbing off business that would have been taken by other people had the price been maintained. Then again, such plants as ours and others will be punished simply because our business ethics were open and aboveboard at all times. I hope you will be able to make the arrangement to give the Great Lakes Portland Cement Corporation an opportunity to establish its real capacity."[19]

Baumberger, Vice President of San Antonio, writing on March 6, 1934 to Conn, President of the Institute, complained of the unfairness of the proposed plan to his company. His letter said:

> "The method of determining the productive capacity of a cement mill as set out in the plan of *sharing available business* for the cement industry,

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[17] Com. Ex. 637 G-J.
Com. Ex. 562-8 L-8 M.
Com. Ex. 562-8 X-8 Y.

[18] Com. Ex. 838 H: Letter dated 3/1/34, from Beck, President, Great Lakes to Young, President, Lehigh.
Com. Ex. 585 E-G: Letter dated 3/8/34, from Baumberger, President, San Antonio to Hogan, President, Lone Star.
Com. Ex. 542 A-B: Letter dated 3/12/34, from Davis, Vice President, Volunteer to Board of Directors, The Institute.
Com. Ex. 426 O-Q: Memorandum dated 3/9/34, from Moyer, President, Vulcanite.

[19] Com. Ex. 838 H.

does not give my Company a fair and equitable pro rata share of the available business.

The majority of the cement plants in the State of Texas established their present pro rata during that period of time when unfair methods of competition were practiced, and this Company then did not think it good business to participate in said methods of selling, preferring to pass up the business. For this reason we did not establish a higher productive capacity at that period of time, so for this, this Company is now being penalized for having been ethical in those times.

The writer talked to the members of the industry in Texas and they are all of the opinion that there should be an upward adjustment in the proration of our mill. I know that the question of productive capacity of each mill is one of contention as many mills can claim that their established productive capacity is less than their actual potential capacity, but it is also a fact that the now established capacity they are operating under is closer to their actual capacity than we are."

He then set forth the percentage of capacity rating allocated by the proposed plan and the revised percentage ratings more favorable to his company and, referring to executives of other companies in his territory, concluded the letter by saying:

"Each of the gentlemen that I spoke to agreed with me that there should be an upward adjustment for our mill along the lines as suggested above and since these gentlemen agree with us, we believe this adjustment should be granted."[20]

Moyer, President of Vulcanite, prepared a memorandum condemning the Storey plan, in the course of which he said, among other things:

"A group of properly regulated free men, banded together against cut-throat competition, and for the

[20] Com. Ex. 585 F-G.

as to discourage consumption, is the kind of a Code we have in mind, and we are very strenuously objecting to injecting this plan for sharing available employment of the largest number of men consistent with the price received, which price is not so high business, into the Code. It favors too much the large chain mills and is a detriment to the small mills, destroying initiative and individuality. Goodwill and reputation, built up by years of successful service, are melted into a mass, and each company becomes a cog in a wheel.

The small companies usually have but one mill, or possibly two mills located in the same district using same price basing point. Whereas the large chain mills have plants in various districts enabling them to ship from a mill having lowest freight rate to the destination involved. During times like the present, when tonnage is so extremely low, the small mill has to reach out beyond the territory paying him the maximum price and meet destination prices figured on other basing points which has the effect of lowering his net mill price to a point which is not profitable.

The plan for sharing available business prohibits him from closing down and leasing or buying from his competitor, as he then becomes a non-operating plant, with prices so fixed that they are prohibitive. So the door is slammed in his face and bridges are burned behind him."[21]

He went on to advocate the opportunity of the small plant to abandon production and to secure cement from some operating plant, and then continued:

[Italicized part quoted in Fdgs. Par. Fifteen (f)]

"What we mean by purchasing or leasing a portion of a cement plant is that we ship our bags to such plant, they manufacture for us and pack the cement in our bags and load it on cars. The mill closed down thus retains brand name and company goodwill.

[21] Com. Ex. 426 O.

> The Vulcanite Portland Cement Company have been operating under this plan for a year, the Hercules Cement Corp., manufacturing for us. The trade have taken very kindly to the idea. We have had nothing but compliments, and *our tonnage has, even from the start, been in accord with the shipments of other plants in this district.*"[22]

Members of the industry convened at Chicago on March 14, 1934 to consider the plan. 73 companies were represented by officers present and 5 by proxies. 13 companies were recorded as absent. The plan was read to the meeting. Representatives of various companies read statements in opposition to the plan. On a motion to strike out all of the plan except the title and to substitute "the accepted report of a committee to be appointed by the Chairman and consisting of three members of the last committee and three members of the group opposed to the plan, these six to elect a seventh member to act as Chairman", the vote was 45 for, and 32 against the motion.[23]

In a letter to Hogan, President of Lone Star, on April 3, 1934, Mallory enclosed a memorandum summarizing the various objections to the plan and stating his answers. His summary of the objections was as follows:

> "Prior to, during, and subsequent to the meeting held in Chicago on March 14th, certain suggestions and criticisms were made in connection with the plan, such as: The total capacity is excessive and not fair. It was established many years ago. Many plants exist only on paper. Will reduce number of salesmen and destroy sales initiative. Overwhelming advantage to chain companies over the individual companies. Quotas should be estimated on all factors instead of only on capacity. Plan gives preference to plants that have over-produced, over plants that have kept orderly pace with the demand. And some other minor objections. Then too some com-

[22] Com. Ex. 426-P.

[23] Com. Ex. 597 A-D.

panies seem to have misunderstood the statistical figures on the large sheets which give the estimates for each district."[24]

Mallory questioned as to the basis of the companies objections to the capacity ratings given to them by Mallory replied that they objected "because companies figured on their potential capacity and my estimates were all made on actual historical production."[25]

Meyer, Vice President of Green Bag, Pa., writing to Affleck as Chairman of the Institute's Committee on Public Relations, stated that in his opinion, harmony within the industry with protection to the smaller companies was very important for the welfare of the industry and, in this connection, he advocated a plan for the allocation of available business and criticized the plan which had been defeated at Chicago as follows:

"This can best be accomplished by a pro-ration plan which meets the necessary requirement of the smaller companies. Last week at Chicago the proponents for the Mallory plan offered nothing in support of it, while the opponents made long arguments. It seemed as though there was an insistence to take that plan or none. Our view of the sentiment indicated only one or two mills opposed to any proration, and we believe this could be limited to one. It was not for the opponents to offer any suggestions when nobody for the plan requested them. We believe that the Mallory plan might appeal to nearly all the smaller companies, if a provision were made that anytime in 1934 a mill could demonstrate its capacity over a three months period, and that all *companies* having a capacity less than one and a half million barrels be given a minimum of fifty per cent of their demonstrated capacity, in order to assure them a livelihood. Those above this rate would prorate with at least fifty per cent of one and a half

[24] Com. Ex. 818-4 C.

[25] (C) Tr. 17231.

million barrels. A pro-ration can be worked out to the satisfaction of the smaller mills, if the chain companies recognize their duty to fairly share with the smaller members of the industry which the NRA particularly requires.''[26]

On April 11, 1934, Coffin wrote to Mallory, expressing the idea that it was unfortunate that his material was received ''in some quarters with a hostile attitude''.

> ''You will remember very early in this game of allocation I said to you that whether rightly or wrongly, the fact remained that a large portion of the industry were antagonistic to the so-called 'Mallory Theory', and that an allocation plan to have any chance of adoption would have to get a different nomenclature.
>
> It has been absolutely impossible to wipe out of the minds of a large number of individual companies the suspicion that the original figures produced were not on the level, and that anything built on those original figures would have to carry all through it the original error, whether intentional or otherwise.
>
> Understand, I am not giving my own personal views on this, but I am giving the view of a large number of individual manufacturers with whom I of necessity came into close contact the last couple years. Naturally, the question arises—if not this what else. My answer to you frankly is 'I don't know'.''[27]

Mallory replied that he felt it was a matter which ''can be solved easily for my records are available to any representative of the companies'' to be checked with the Bureau of Mines or with the companies or figures on capacity ratings, and added:

> ''This is a matter that can be solved easily for my records are available to any representative of the companies so that they may be checked with the

[26] Com. Ex. 821-4 Y.

[27] Com. Ex. 821 N.

records of the Bureau of Mines or with those of the companies and thus learn whether the capacity ratings are correct. My records for the period from 1925 to July 1931 have been obtained from the Bureau of Mines, which receives its reports from the companies themselves. Since July 1931 I have received reports directly from the companies and all the capacity ratings, therefore, are based on the figures reported by the companies themselves. The rating of every company in the United States is estimated on its three highest consecutive months' actual clinker production as reported by the companies, with no exception.

I feel that, in all fairness to myself, those who have the suspicion you mention should proceed at once to check the capacity ratings and I am ready to cooperate with them at any time or place they may decide."[28]

THE BROBSTON COMMITTEE PLAN

After passage of the motion defeating the plan, the Chairman appointed S. W. Storey, B. S. Smith, J. S. Young, members of the old committee, and C. Burnett, F. W. Weibel, and W. A. Davis, members of the group opposed to the plan, as a new committee. These gentlemen were unable to agree upon a Chairman and finally the president of the Institute requested J. Brobston, President of Hercules, to act as chairman and he accepted.[29]

Mr. Brobston's committee held its first meeting on April 12, 1934 and endeavored to find a starting point for development of a new plan. The meeting authorized the Chairman to secure shipping figures for the last five years for each individual mill and thereupon adjourned.[30] Brobston wrote to McKelvey, another member of the committee on April 24th, that after listening to the views expressed

[28] Com. Ex. 821 M.

[29] Brobston, President, Hercules. (R) Tr. 26252.

[30] Com. Ex. 236 A: Committee Minutes, 4/12/34.

at this meeting "I came to the conclusion that it would be impossible to harmonize the conflicting views and arrive at any national plan of allocation that would have any chance of being accepted by a substantial majority of the industry."[31] Brobston also advised in this letter that after making rather extended inquiries, it was evidently the desire of a very large majority of the members of the Institute that some plan be reached and he, therefore, had drawn up a method for allocation by districts.

On May 18, 1934, Brobston wrote Conn, President of the Institute, reviewing the difficulties of reaching an agreement with the committee as then organized and submitted his own plan for allocation agreements by districts. The sense of this plan was that the members of each district should determine the percentage of business of their plants in the district that should be allotted to the chain companies and the percentages to be allotted to single plant companies and that the chain companies should agree among themselves as to the division of their percentage allotment and the single plant companies do likewise, leaving each group to determine for itself upon what basis the individual allocations should be made. The allocations so arrived at were to apply to all shipments regardless of destination within or without the district. However, if any shipments from one district into another in any predetermined period should be in excess of 5% above the average for the past 3 years of similar shipments, then on request of the producers in the district into which the excess shipments were made, the Code Authority should conduct an investigation to determine whether the increase had been due to natural development of business or due to the use of an unfair trade practice, and if the latter case the Code Authority should take steps to correct any inequalities discovered. Should the shipments of the chain group or the single company group in any quarter year

[31] Com. Ex. 808-2 M.

exceed its percentage allotment, the group should pay to the other group a sum equal to 50¢ per barrel on the excess shipments.[32]

The committee met again on June 15, 1934 with various changes in its membership. Mr. Burnett of Monolith presented a plan based upon a division of business calculated at 80% of capacity. Mr. Conn advocated the district plan rather than a national plan. Mr. Burnett's plan was referred to Mr. Mallory with the request that he prepare figures in relation thereto. The meeting adjourned, to convene the day before the next meeting of the Board.[33]

At the meeting of the Institute held on July 10, 1934 it was moved that the present committee on plan for sharing available business be discharged. This was unanimously voted and it was then moved and carried that the Chair appoint a new committee to study the subject.[34] No such committee was ever appointed.[35]

No Plan Discovered Which Gave Advantage to Enough Companies to Win Support

In his testimony Brobston fairly summarized the attitude of the industry toward any plan for sharing available business and the difficulties inherent in such a plan even at the period of time when such a plan, if approved by the NRA Administrator, would have had the force of law. Brobston testified:

> "Q. There has been offered in evidence here, and it has been discussed on the record in your absence, a so-called Mallory [Storey Plan, *supra*, p. 2132] plan. What was your attitude toward the so-called Mallory plan under the NRA Code, Mr. Brobston? A. I thought that it was entirely impracticable.

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[32] Resp. Ex. 1098.

[33] Com. Ex. 636 B-D: Committee's Minutes, 6/15/34.

[34] Com. Ex. 598 E-r: Members' Minutes.

[35] Brobston, President, Hercules (R) Tr. 26269.

Q. As chairman of that committee, I mean the committee on the plan for sharing the available business, what did you understand was the purpose of the committee? A. I understood that the purpose of the committee was to comply with a condition of the Code—or a provision of the Code. I understood that the Code provided that there could be an allocation made of shipments, and that this committee was to look into the question of whether any one could be arrived at that would be satisfactory to the cement companies, and to the Government.

Q. Did you think any plan could be devised that would meet with the approval of the industry? A. I did not, personally.

Q. What happened? Were the individual members opposed, generally, to any sort of plan or were they opposed to the particular plan, or were there plans considered? What happened? A. I found that some manufacturers were opposed to any plan at all. Others were opposed to the particular basis which the allocation committee originally proposed.

Q. Why was that? A. Well, I found that none of them would be favorable to any allocation plan unless it gave them some advantage. If it gave them an advantage over the other companies, they were in favor of it.

Q. Did you observe at that time any alignment of companies in any groups; I mean, alignments of big companies versus small companies in this disagreement over what was a fair plan? A. I don't remember talking to any of the large companies about it at all. The ones I talked to were the smaller companies.

Trial Examiner Norwood: Did they favor it?

The Witness: Some of them did and some of them did not, your Honor. As I say, if they thought it was to their advantage they favored it. If they didn't, they didn't favor it.

By Mr. Leisure:

Q. In attending these meetings of this committee on the business-sharing plan, what did you attempt to do with the plan? A. Are you referring to the first committee or the second committee? There was

a committee which presented a plan which was considered out in Chicago, but I didn't even go to the meeting. I gave Mr. Coffin my proxy and asked him to vote against the plan. That was the first committee, the first plan.

Q. I am referring to the second plan. A. The second committee?

Q. Yes. A. The one of which I was the chairman?

Q. Did you push it in any way? I wanted to know what happened; that is all. A. We had a number of meetings and there didn't seem to me there was the slightest possibility of getting an agreement, and so I reported back. I didn't see any use in continuing the committee because I didn't see there was any possible chance of anybody ever agreeing to a plan.

Q. And how did you happen, then to accept chairmanship of the committee on this plan of sharing the business? A. Mr. Coffin was president of the Institute. He was a very conscientious man and he felt it was his duty to try and carry out any provision in the Code. He was very close to me, we were good friends, and he asked me as a favor to take the chairmanship of the committee.

The people who had been trying to allocate on production capacity hadn't gotten anywhere, and he wanted to see if I could get anywhere on the basis of shipments."[36]

Consideration of Storey Plan in Districts 1 and 2

The Trustees at a meeting on August 15, 1934, passed a resolution that the plan for sharing available business prepared by a committee headed by Mr. S. W. Storey—the plan that had been rejected by the full membership of the Institute in the previous March—"be submitted to the membership in Districts #1 and #2 for such action as those members desire to take."[37]

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[36] Brobston, President, Hercules (R) Tr. 26249-52.

[37] Com. Ex. 621 E: Trustees' Minutes, 8/3/34.

[Italicized parts quoted in Fdgs. Par. Fifteen (h)]

Districts #1 and #2 met on September 12th for the stated purpose of considering the Storey plan. The minutes recite that ["*after a discussion, the roll-call showed that the membership in Districts #1 and #2 were unanimous for some plan of sharing of available business.*"][38] Thereafter Mr. Brobston read to the meeting his draft previously described.[39]

The minutes then recite:

[Italicized part quoted in Fdgs. Par. Fifteen (h)]

> ["*After considerable discussion the Chair recognized Mr. Coffin who moved that the Trustees of Districts #1 and #2, calling in such assistance as they may deem advisable, attempt to formulate a plan of allocation of business in Districts #1 and #2, seconded by Mr. Conn and unanimously carried.*"][40]

Following this meeting on September 27, 1934, Coffin, President of Nazareth, wrote to Conn, President of Giant, as follows:

> "As you know, from the very beginning of our Code writing there has been in the minds of a large portion of the industry the thought that during this depression, and the consequent shortness of the demand of our product, that some sort of allocation of going business was highly desirable.
>
> As you also know, a large portion of time and for that matter money and energy was expended in the endeavor of various committees to work out such an allocation that might be applicable to the country at large.
>
> You also know that all these plans, for one reason or another, were turned down by someone in the industry and, for that matter, probably by sections instead of individuals. The last move along this line was taken by the Board of Trustees of The Institute

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[38] Com. Ex. 637 L: District Meeting, 9/12/34.

[39] *Supra*, p. 2140.

[40] Com. Ex. 637 K-O: District Meeting, 9/12/34.

in which Districts 1 and 2 were given permission to present a plan to The Code Authority for the equitable allocation of business between the members operating in Districts 1 and 2 for such further steps as might be deemed desirable.

[Italicized part quoted in Fdgs. Par. Fifteen (h)]

[*A canvass of all the members in Districts 1 and 2 seemed to indicate that in the past the business seemed naturally to fall in figures which showed that 62% of the going business in Districts 1 and 2 fell to the so-called 'Chain Companies,' and that naturally the remaining 38% fell to the individual or smaller operating units. I think the statement was made that from whatever angle you looked at the picture, the division remained practically the same.*]

Since in Districts 1 and 2 the larger number of operators are small companies, it seems very desirable that somehow or other we should be able to get figures from individual companies as to what portion of the going business they individually thought their position in the industry and past history entitled them to.

Therefore, assuming that the going business in Districts 1 and 2 for any particular year should be 16,000,000 barrels, and assuming again that 38% of that, or 6,080,000 barrels, would naturally fall to the smaller operators, what in your judgment should you have sold or shipped in that particular year?

Naturally, I am addressing a similar letter to each chief executive of the smaller independent operators in Districts 1 and 2, and am addressing one to Mr. Robeson who will answer for the Nazareth Company.

I will attempt to marshal these figures, keeping the information furnished by each individual company confidential. It is quite evident that if the total for the individual operators of the small companies as distinguished from the chain companies should fall within a total of 6,080,000 barrels, that nothing much further would need to be done except to formulate a plan which would mechanically represent these respective figures, and later on, if deemed advisable,

to submit the formula and figures to The Code Authority of The Cement Institute for the purpose of securing administrative approval.

I am assuming this duty by reason of the fact that I was the Chairman of the original Committee on Allocation duly appointed by the Board of Trustees of The Institute and, therefore, naturally anxious and desirous of reaching some equitable and just allocation.

May I hear from you on this matter?"[41]

To this Conn replied:

"I am very much interested in the subject discussed in your letter of September 27th, and consider that the share of business to which this Company is entitled in the particular year to which you refer, to be 481,764 barrels. You will probably recognize these figures as based on the percentages shown in the Storey Plan submitted to the industry, and I believe the basis used in figuring out the correct proportion of each of the active companies to be the best one of which I have any knowledge. I might say that I recognize the desirability (and probably the necessity) of an adjustment of percentages as new production comes into the market in Districts 1 and 2."[42]

These districts met again on October 26, 1934 and the Trustees stated that they had no report to make at that time. Mr. Coffin said that while the Trustees were not yet ready to report, it did not mean that no work had been done because much labor had been expended.[43] These districts met again on February 13, 1935 and "the Chair requested a report from the committee on sharing of available business which committee had nothing to report at this time".[44] These districts met again on April 25, 1935; the minutes

[41] Com. Ex. 577-2 P-Q.

[42] Com. Ex. 577-2 R.

[43] Com. Ex. 637 T: District Meeting, 10/26/34.

[44] Com. Ex. 637 X: District Meeting, 2/13/35.

recite "The Chair requested a report from the committee on sharing of available business which committee had nothing to report and on motion made, duly seconded, and unanimously carried, the committee on sharing of available business was discharged".[45] No plan for the allocation of business in Districts #1 and #2 ever went into effect.[46]

IT IS THE STATE OF MIND THAT THAT STUFF IS THERE FOR.

During the testimony of the witness Alexander, President of Missouri, the following colloquy took place:

> "Do you or do you not recall attending a meeting of the industry during the Code period at which that plan was discussed?
>
> Mr. Wooden: Your Honor, I want to direct attention to the fact that I have long since stated on the record that there would be no contention made that the plan of allocation of business proposed under NRA went into effect.
>
> • • •
>
> Mr. Seeley: Well, further, your Honor, it is important to show the state of mind of these respondents, and this one in particular, with respect to this plan. Mr. Wooden's purported concession helps us not at all in view of the charges.
>
> Trial Examiner Norwood: Well, ask him for his state of mind.
>
> Mr. Wooden: It is the state of mind that that stuff is there for.
>
> Mr. Seeley: What is that?
>
> Mr. Wooden: Stuff about allocation.
>
> Trial Examiner Norwood: Go ahead.
>
> *By Mr. Seeley:*
>
> Q. What, Mr. Alexander, was your attitude toward this plan to which we have referred, the so-

[45] Com. Ex. 637 BB: District Meeting, 4/25/35.

[46] Brobston, President, Hercules (R) Tr. 26269-70.
Scott, President, Keystone (R) Tr. 27394-95.
Porter, President, North American (R) Tr. 33789-90.
Reiter, Vice President, Universal Atlas (C) Tr. 17091-92.

called plan for sharing available business? A. I did not consider the plan workable. I was opposed to any plan for sharing the business.

Q. Did any plan for sharing available business, to your knowledge, ever go into operation? A. No.

Q. And, to your knowledge, has there ever been any agreement among any cement manufacturers of competitors, that they should or should not ship into each other's territory? A. Never heard of any such agreement."[47]

The witness Hogan, President of Lone Star, examined as to whether his company had ever had any understanding or agreement concerning allocation of business or any shipments, testified:

"Q. Do you know of that question ever coming up at any time, other than during the NRA, Mr. Hogan? A. The NRA was the only time it was ever brought up.

Q. Was any agreement reached, so far as you were concerned, at that time? A. There were as many different plans as people present, I think. There was nothing like an agreement."[48]

The witness Moore, Vice President of Dewey, examined as to the plan for sharing available business during the NRA Code, testified:

"Q. And did the Dewey Company give any consideration to that plan? A. Well, not very much. We never thought it was feasible or that it would work. It was discussed in our offices, and between myself and the various other officers.

Q. And you say it was discussed. What was the purpose or object of your discussion; what did you understand? A. Well, we understood that that was something that was likely to come into effect under the Code, therefore, we had to give it consideration.

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[47] Alexander, President, Missouri (R) Tr. 37192-93.

[48] (R) Tr. 34569.

Q. Did the Dewey Company operate on any quota or any other scheme of production during that period? A. No, sir, only supply and demand for our own product."[49]

The witness Wood, General Manager of Green Bag, W. Va., testified that his company was very much opposed to the so-called plan for sharing available business which was voted on at the Institute meeting, and that no plan became operative and that he never heard of any companies surrendering any business which they could get because of any plan.

"Trial Examiner Norwood: Did you find they were all willing to limit the other fellow's business?
The Witness: Yes, and take all they could get themselves,—"[50]

The witness Dannelly, Vice President of National, testified:

"Q. Tell me this: Is there any particular share of the business that the National Company is satisfied to get? A. No, sir.
Q. Well, do you recall the several proposed plans for sharing the business under the NRA? A. No, sir; I do not recall any of them.
Q. Have you at any time had any arrangement with competitor companies for dividing up the business among you? A. No, sir.
Q. Has there been any time in your experience that you found any of your competitors were willing to let you have a given share of the business? A. I did not quite get that.

• • •

(Question read.)

A. I never found any willing to let us have anything."[51]

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[49] (R) Tr. 46735-36.

[50] Hogan, President, Lone Star (R) Tr. 29486.

[51] Dannelly, Vice President, National (R) Tr. 39592-93.

Several companies were opposed to the idea of any allocation of business.[52]

Many testified that no plan of any kind ever went into effect.[53]

4. Opposition to New Plants

Article VII of the NRA Code provided:

> "Prior to the construction or operation of a new plant, or the increase in the productive capacity of an existing one, or the movement of all or part of such a plant from one place to another, The Cement Institute, on receipt of such information, shall promptly collect complete information concerning existing productive capacity in the area in which the proposed new plant is to be located, together with data concerning consumption of cement in that area. If these data disclose that such new plant will result in further increasing the problem of over-production or over-capacity in such area, The Cement Institute may petition the President to prohibit the construc-

[52] Federal: Bates, Sales Manager (R) Tr. 30754.
Keystone: Scott, President (R) Tr. 27392-93.
Marquette: Colburn, Vice President (R) Tr. 39036-37.

[53] Consolidated: Storey, President (R) Tr. 47574-75.
Green Bag, W. Va.: Wood, A. T., General Manager (R) Tr. 29485.
Hawkeye: Manley, General Manager (R) Tr. 41607.
Hercules: Brobston, President (R) Tr. 26268-70.
Keystone: Scott, *supra;* Tr. 27392, 27394.
Missouri: Alexander, President (R) Tr. 37193.
Monarch: Brooke, Vice President (R) Tr. 42220.
North American: Porter, President (R) Tr. 33790.
Whitehall: Elliott, Vice President (R) Tr. 28477.
South Dakota Cement Plant: Hartley, Sales Manager (C) Tr. 41541.
Southwestern: Warren, G. E., Vice President (R) Tr. 29206-07.
Universal Atlas: Reiter, G. H., Vice President in charge of sales; general manager the Institute (C) Tr. 17043-44, 17091-92.
Volunteer: Lewis, Manager (R) Tr. 31682.
West Penn: McKee, Vice President (R) Tr. 27827, 27830.

tion, or operation, of the proposed new plant, or the increase in manufacturing capacities of such existing plants. * * *"[1]

Mallory, the Institute's statistician, writing to Porter, President of North American, in October, 1933 concerning the disposition of idle plants in the calculation of capacity ratings to be given to cement companies, touched upon the purchase of plants for the purpose of retiring their production from the field. The letter said:

> "Some of these idle plants were purchased by the present owners as a matter of protection; for example, the Alsen plant of the Lehigh Company was purchased to prevent its being acquired by a group of men outside the industry; so that, as a matter of fact, every plant that ships into New York City and the Eastern New York State Territory has benefitted because this plant has not been operated since 1927. Another case is the Gilmore City plant of the Northwestern States Company, which purchased this plant to prevent its operation by the Marquette Company."[2]

At the meeting of the Trustees on October 25, 1933, the Chair read a letter from Aetna relative to a proposed new kiln at their Bay City plant. The trustees advised that the letter be answered explaining the provision of Article VII and stating that the situation could be more fully discussed after the Code had been approved and the Code Authority set up.[3]

[Italicized part quoted in Fdgs. Par. Sixteen (b)]

The Trustees, at their meeting on December 7, 1933, passed a resolution that the problem presented by Article VII should be handled by the Code Authority, but ["*it is the position of this Board that there should not be any in-*

[1] Com. Ex. 557.

[2] Com. Ex. 550 Q.

[3] Com. Ex. 612 D: Trustees' Meeting, 10/25/33.

crease of productive capacity in any area seconded by Mr. Affleck and unanimously carried.''][4]

On December 11 the Chairman of the Code Authority wrote Young, president of Lehigh, asking him to act as chairman of a committee to be composed of himself, Coogan and Conn to prepare data to be filed with the President of the United States in regard to the construction of new cement plants. He enclosed a letter from Porter, president of North American, referring to a proposed new plant at Brodhead, Pa. and invited the attention of the committee to its contents.[5] The committee found that conditions justified a petition that the erection of the plant be forbidden and a petition signed by the president of the Institute was presented to the Code Authority on December 20. The Code Authority filed the petition with NRA for presentation by it to the President of United States.[6] Coogan testified that after gathering all the facts as to production and consumption and demand for cement in the field affected by this new plant and presenting the information to NRA, no action was ever taken. The plant was completed and put in operation and still continues in operation.[7]

On December 28, 1933, Kanengeiser, President of Superior, wrote the chairman of the Code Authority that certain named persons were selling or trying to sell stock in a proposed cement manufacturing company to operate in Lawrence County, Ohio, and stated:

> ''There is certainly no need of a cement mill in this vicinity. It is hard enough for ourselves and Alpha

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[4] Com. Ex. 616 D: Trustees' Meeting, 12/7/33.

[5] Com. Ex. 924: Letter dated 12/11/33, Rader, Chairman, Cement Code Auth. to Young, President, Lehigh.

[6] Com. Ex. 629 B: Code Minutes, 12/20/33.

[7] Coogan, Vice President, Alpha (R) Tr. 24019.

and Green Bag to find business, to say nothing of dividing it still further."[8]

The matter was referred to the same committee[9] with an expression of hope that if a petition was filed in this matter, it would strengthen the petition in the former case, "as it would show that promoters are still trying to increase the production of Portland cement in the country." A petition was drafted.[10] Coogan testified that this petition was presented, but that nothing happened and that the plant never got beyond the rankest promotional stages.[11]

PROPOSED PLANT AT FOREMAN, ARK.

[On January 11, 1934, Nichols, Vice President, Arkansas wrote to Boettcher, President of the Ideal Cement Company:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"We have heard several rumors here to the effect that the cement plant at Foreman, Arkansas, is trying to resume building operations and operate under the Code Authority.

My understanding is that no new cement plants will be permitted, under the N.R.A. and wish that you would, on receipt of this letter, take this up with Mr. Rader at Chicago and have him investigate this plant at Foreman and see what their intentions are.

With the curtailment of production of other going concerns, it would be a catastrophe if any additional tonnage were put on the market at this time."[11a]

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[8] Resp. Ex. 1852; Com. Ex. 415 (41).

[9] Com. Ex. 573: Letter dated 12/29/33, Rader, Chairman, Cement Code Auth., to Young, President, Lehigh.

[10] Resp. Ex. 1851; Com. Ex. 812 S: Letter dated 1/8/34, Young, *supra*, to Coogan, Vice President, Alpha.

[11] (R) Tr. 24020.

[11a] Com. Exs. 415-28.

On January 13, 1934, Boettcher, President of Ideal Cement Company, the holding company controlling, among others, the Arkansas and Oklahoma companies, wrote the chairman of the Code Authority that a plant at Foreman, Arkansas, which had been started a number of years ago by promoters and left half finished, was to be completed and asking whether [*"the completion of the Foreman plant can be stopped or not."*][12]

In the light of experience with its petitions, the committee took no immediate action in relation to the Foreman plant. However, the Reconstruction Finance Corporation made inquiry of the Code Authority in connection with a proposed loan for the Foreman plant and the matter was referred to Young, Chairman of the committee, by Rader, Chairman of the Code Authority, in a letter dated March 10, 1934, as follows:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

[*"I enclose herewith letter from the Reconstruction Finance Corp., in regard to a loan they are requested to make to complete a Cement Plant in Southwestern Arkansas. Also attached is all the data the Portland Cement Association has available. I am sending this to you as Chairman of the Committee on Building New Cement Plants.*

I am also enclosing a few letterheads of the Code Authority, and if you can add some data to this, I wish you would write a letter. You can sign my name to it and forward it. I thought also it might be advisable to have someone call on the Reconstruction Finance Corp., 33 Liberty Street, New York City.

If you agree with me on this method of handling it, wish you would do so and send copies back to me for our files. You will notice he asks for two copies of the data."][13]

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[12] Com. Ex. 415 (27, 28).

[13] Com. Ex. 415 (22).

On March 15, 1934 the Code Authority wrote to the Reconstruction Finance Corporation setting forth the conditions of mill capacity and the consumption of cement in the districts which would be affected by a plant at Foreman, Arkansas, and summarized the situation in this paragraph:

> "Within these districts comprising the potential marketing area of the proposed new Arkansas plant are twenty-two plants operated by fifteen companies. The cement plants represent an investment of approximately $57,000,000 and operated at an average of 27.6% of capacity during the year 1933."[14]

RELOCATION OF PART OF PLANT AT VICTORVILLE, CAL.

[Italicized part quoted in Fdgs. Par. Sixteen (b)]

The Code Authority at its meeting on March 13, 1934 considered a letter from Southwestern to the president of the Institute requesting permission to remove 50% of its Victorville, California, plant to Torrance, California. The concensus of the meeting was that under Article VII, this matter should be handled by the Institute and that it be referred back with the suggestion that the request be allowed "provided that this move did not in fact increase the capacity of the plant".[15] At a meeting of the Trustees on May 10, 1934 the chair read a report from John Treanor, Trustee of District 11 (California), recommending that the Southwestern Company be permitted to relocate 50% of its Victorville Plant, the members of the Southern California District having accepted the statement of Southwestern that the relocation would in no way increase the productive capacity of the District. The motion was then unanimously carried that Southwestern ["*be granted this permission in accordance with the statements made in their letter*".][16]

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[14] Com. Ex. 574 M-N.

[15] Com. Ex. 631 B: Code Authority Minutes, 3/13/34.

[16] Com. Ex. 620 C: Trustees' Minutes, 5/10/34.

METROPOLITAN WATER DISTRICT OF LOS ANGELES

In April, 1934 Treanor, President of Riverside, and Trustee of District 11, wired Affleck, President of Universal Atlas, that one Traylor proposed to the Metropolitan Water District of Los Angeles the construction of a plant to supply cement to that body on condition that the water district provide 50 or 60% of the cost on a mortgage. The telegram asked for information as to Traylor's financial ability and the possible attitude of the Code Authority and NRA to such a proposal.[17] Affleck referred the matter to Blaine Smith, President of Penn Dixie, who wired Treanor concerning the possible financial condition of Traylor and stating that the Chairman of the Code Authority if supplied with the facts, particularly showing over-capacity of existing plants in the Southern California area, would file a petition, but drawing attention to the fact that the petition filed relating to the proposed plant at Brodhead, Pa. had not so far been successful and NRA had advised, "they considered it inadvisable for us to push the matter at that time". A week later Treanor wired Smith that their conferences with the Water Board of Los Angeles were proceeding satisfactorily.[18] This appears to have ended that matter.]

AFTER NRA: THE FOREMAN, ARK. PLANT AGAIN

On May 24, 1935, Boettcher wrote Blaine S. Smith, President of Penn-Dixie, who was active in Institute affairs, and stated in part:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"At a court hearing connected with the foreclosure sale of the cement plant equipment at Foreman, Arkansas, the other day, I am informed there was testimony offered to the effect that the management of

[17] Com. Ex. 553-2 M.

[18] Com. Ex. 562-16 F, G, J.

the defunct Company anticipated that you would join with them and complete building of the Plant.

I trust that this statement he made was without foundation, Mr. Smith, as I feel that two Plants located as close together as would be ours at Okay and yours at Foreman would be unable to earn returns on the investment. In fact, it has been my intention to bid on this equipment and if possible, purchase it in order to remove it as a menace to the market in Arkansas. As you know, there are so many Plants, which sell into the State of Arkansas that there is very little business for any one of them, and placing this promotion at Foreman into production would make conditions much worse than they are at present, with probable resulting price demoralization."[19]

Smith replied, in part:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"We naturally are interested in seeing no increase in cement productive capacity in the country. There is too much already. But, if this plant is going to be completed anyway, and, of course that is their intention we thought we might be interested in it. The result of our investigation was not favorable and I doubt if we could become interested. I understand the sale which was scheduled was postponed to a later date."[20]

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

On September 30, 1935, Burnett, an officer of Monolith, wired to Coogan that he understood that the RFC had authorized a loan of $300,000 to the American Portland Cement Company[21] for the completion of the Foreman plant and stating *"Believe this matter merits intelligent opposition."* Coogan replied by wire:

"TELEGRAM RECEIVED CEMENT INSTITUTE WIRING PROTEST AGAINST LOAN TO FOREMAN ARKANSAS PLANT COPY OF WHICH WILL BE SENT YOU THIS WILL BE FOLLOWED UP VIGOROUSLY BY PERSONAL CONTACTS."

[19] Com. Ex. 500 H.

[20] Com. Ex. 500 G.

Thereafter, Coffin wired Jesse Jones:

> "The Cement Institute representing practically all cement manufacturers in the United States protest against granting loan of $300,000 to American Portland Cement Company for construction and completion of new cement plant at Foreman, Arkansas. The cement industry in the United States is working at less than 30% of capacity, and the plants located in the states of Missouri, Kansas, Oklahoma, Arkansas and Texas can furnish three times the cement needed to supply demand. There is no logical or economic reason for the government to advance money to put this plant in operation in an industry already greatly overproduced. This loan is in direct contravention of the statement of President Roosevelt appearing in the New York Herald Tribune April 22 wherein he expressed his objection to the idea of loans for expending operation in already overcrowded fields: 'A cement manufacturer asked a loan to build a new cement plant. Existing cement plants have a productive capacity far above immediate or prospective demand. Why should this manufacturer get money to go into an overcrowded field?' We earnestly request that you decline to make this advance."[21]

To which Jones replied under date of October 8, 1935:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

> *"Permit me to acknowledge your telegram of October 1.*
>
> *This Corporation has made a commitment to the American Portland Cement Company. The economic justification for this loan was that the Engineers' reports indicated that the plant could operate at a profit if completed according to plans and specifications. The record further showed that a very large*

[21] Com. Ex. 942 B.

[22] Com. Ex. 942 C: Telegram dated 10/1/35, Coogan, President, Alpha, to Burnett, Monolith.

[23] Com. Ex. 1029 A.

number of innocent stockholders had invested six or seven hundred thousand dollars in the stock of this Company, which investment represented a total loss to them unless the plant could be completed.

If the applicant is able to meet the conditions imposed, the Corporation will be compelled to comply with its commitment.''[24]

On October 1st Coffin wrote members of the Institute enclosing a copy of his protest to the RFC and stating:

"The telegram tells the story, but the story needs all the backing your can give it through your own channels. Write me that you are helping."[25]

On October 10 Morse, Vice President of Ideal, wrote Affleck of Universal Atlas setting forth the conditions stipulated by RFC for a loan of $300,000 to the Foreman plant and concluded:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"As I stated to you over the 'phone, this loan is apparently a menace to the entire cement industry, as it will constitute the entry of the United States Government in the manufacture of cement.''[26]

On October 14 Coffin wrote again to Jones[27] stating that the amount of the proposed RFC loan as announced in the public press would not complete the physical structure of the plant and that the company would require a minimum of $250,000 as working capital and also pointing out that overproduction in the cement industry had already caused a capital loss of not less than 75% of investments, and in many cases, investments had been entirely wiped out.

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[24] Com. Ex. 1029 B.

[25] Com. Exs. 576-5 H, 547-4 K.

[26] Com. Ex. 553-5 Z-6 A.

Coffin notified all members of the industry of his second letter to Jones, and after setting forth the essential paragraph of the letter, he added:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"On the whole, I would say that my previous request for help in this situation has met with a very generous response, and RFC by this time, in addition to The Institute's protest, has a large number of individual manufacturers' protests. I think we are making real progress, but additional help is highly desirable. Kindly advise me of any steps that you take along the line of backing up The Institute's protest."[28]

On November 18, 1935 Reiter, General Manager, circularized the members of the Institute with a copy of a syndicated article by B. F. Forbes dated November 12, 1935. In this circular, Reiter stated:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"*The attached syndicated article by B. C. Forbes may already have reached your attention.*

The article indicates very clearly Mr. Forbes' friendly interest in this Industry, as has previously been shown on a number of occasions. This present article was based on information from various sources compiled and prepared by the Cement Information Bureau of The Cement Institute and personally presented to and discussed with Mr. Forbes by Colonel Reynolds."

The article attacked the waste of taxpayers' money by RFC loans to overdeveloped industries and dealt particularly with the proposed Arkansas plant.[29] Reiter circularized the Institute members on December 14th enclosing copy of the resolution passed by the national convention

[27] Com. Ex. 1029 C.

[28] Com. Ex. 500 B.

[29] Com. Ex. 1032 G, H.

of the National Association of Manufacturers condemning RFC loans to expand existing units "in certain industries already built to a point in excess of any present or reasonably prospective demand." Reiter's letter stated that:

[Italicized part quoted in Fdgs. Par. Sixteen (c)]

"* * * *Colonel John B. Reynolds of The Cement Information Bureau of this organization appeared before the Resolutions Committee for the purpose of presenting and discussing a resolution which he had been requested by officials of the National Association of Manufacturers to draft in regard to the policy of the Reconstruction Finance Corporation in extending loans to units of industries already in a state of excess capacity of production."*[30]

On January 28, 1936, Reiter forwarded the Institute's data on the proposed Foreman plant to the Portland Cement Association in the Press Building, Washington, in response to a request therefor in order to aid the Portland Cement Association in responding to inquiries made of it by a representative of the RFC.[31]

On February 11, 1936, the Manager of the Washington office of the Portland Cement Association wrote the Institute in part:

[Italicized part quoted in Fdgs. Par. Sixteen (d)]

"Sorry to be delayed in thanking you for the material which you so promptly sent to us regarding the proposed RFC loan to the American Portland Cement Company at Foreman, Arkansas, and the Washington-Idaho Lime Products Company at Orofino, Idaho.

I am holding the material regarding the former item until we are approached again by Mr. Macartney of the RFC."[32]

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[30] Com. Ex. 674.

[31] Com. Ex. 1028 F-G.

[32] Com. Ex. 1028 G.

On November 12, 1936, Scovel, of Universal Atlas, wrote to Reiter that a Mr. Brown who was the chief creditor of American Portland Cement Company, owner of the proposed and half built Foreman plant, had stated that the RFC had granted the loan and that the completion of the plant would proceed immediately.[33] On November 24th Reiter replied stating that he was informed as of June 23, 1936 that the RFC had granted a loan of $50,000.[34] Reiter testified that this plant never operated and that "it was a promotion proposition, as a good many of them have been.."[35]

PROPOSED PLANT AT OROFINO, IDAHO, IN 1936

In January, 1936, the Institute gave attention to a proposed plant at Orofino, Idaho, by the Washington Idaho Lime Products Company. It was reported that the RFC was considering a $100,000 loan for the completion of this construction. On January 10th, Coffin, President of the Institute, wired the chairman of the RFC protesting the loan and, after citing the figures of production and consumption in the states of Idaho and Washington said, "It therefore is apparent that the capacity now existing is four times the average requirements over a period of years. It does seem unreasonable and unbusinesslike for any Federal funds contributing to a further over-capacity in this region."[36] On the following day, Young, President of Lehigh, addressed the Chairman of the RFC substantially to the same effect.[37] Ten days later Lucas, President of Superior Portland, addressed Jones, reviewing the over-capacity in the

[33] Com. Ex. 1029 E.

[34] Com. Ex. 1029 G.

[35] Reiter, Institute General Manager (C) Tr. 4463.

[36] Com. Ex. 1028 B.

[37] Com. Ex. 1028 C.

area affected by the proposed plant and the inability of the plant as a small one to compete effectively on large projects like Coulee Dam.[38] On January 23, the Vice President of Nazareth wrote Reiter advising the receipt of a letter from Jones to Coffin, acknowledging receipt of Coffin's telegram and advising that it had been placed "in the files".[39] M. A. Foster of the Statistical and Economic Division of the RFC called at the office of the Portland Cement Association in the Press Building, Washington, and made inquiries concerning the cement industry in the area affected by the proposed Orofino plant sometime prior to February 11, 1936.[40] Whether the loan was ever made or not was not known to Reiter.[41] In any event, the plant came into operation.[42]

PROPOSED PLANT BY THE GOVERNMENT IN PUERTO RICO

Minutes of the trustees at their meeting of December 17, 1936 show:

> "The Secretary called attention to a report on the protest made against the Government construction of a cement plant in Puerto Rico, which report was distributed to all members of the Industry as Executive Letter No. A-49. It was the sense of the meeting that no further action should be taken on this matter."[43]

The witness Reiter testified:

> "Q. Did the industry, through the Institute, file objections to the establishment of a government-owned plant in Puerto Rico? A. Yes, sir.

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[38] Com. Ex. 575 A, B.

[39] Com. Ex. 1028 D.

[40] Com. Ex. 1028 G: Letter dated 2/11/36, Beeman, Portland Cement Association, to Reiter, General Manager, the Institute.

[41] Reiter, *supra*, Tr. 4450.

[42] Id., Tr. 4449.

[43] Com. Ex. 627 D.

Q. The plant, nevertheless, was constructed? A. Yes, sir—that is, it is under construction at the present time.

* * *

By Mr. Wooden:

Q. What was the interest of the industry in objecting to the plant in Puerto Rico? Did it ship into Puerto Rico from this country? A. Yes, sir. It had another interest too, which I think is evident: Several members of the industry had investigated the possibility of a plant in Puerto Rico and had made rather complete surveys, on the basis of which they felt it was unwise to invest—an impossible proposition. If it was impossible, commercially, it looked like a bad expenditure of taxpayers' money."[44]

OBJECTION TO COMPETITION FROM STATE-OWNED PLANTS

Examined on the general objection of the cement industry to competition from Government-owned plants, Reiter testified:

"Q. Did the Cement Information Bureau collect and distribute news articles and editorials which appeared in various papers in opposition to State-owned plants? A. Well, they collected articles. How widely they distributed them, I do not know.

Q. Did they assist or encourage the preparation or publication of such articles? A. I do not know that. If they did, it probably consisted of sending information which they had collected from such sources to special newspaper writers and special writers for magazines.

Q. Were steps taken to syndicate the publication of such items and articles? By syndicating, I mean to say that it would appear in a large number of papers taking the service of the special writers. A. You mean that steps taken to syndicate by the Cement Institute——

Q. (Interposing) The Cement Information Bureau, to make special arrangements with special

[44] Reiter, General Manager, the Institute (C) Tr. 4471.

writers that it would be syndicated? A. Only that they occasionally sent to a mailing list of special writers some releases which they had."[45]

PROPOSED PLANT AT HARTSHORNE, OKLA.

Manufacturers, selling in Oklahoma, concerned themselves with a rumor that an old plant at Hartshorne, Oklahoma, might be put into operation and wrote to the Cement Information Bureau about it in 1936.[46]

Brooke of Monarch, examined as to his interest in the Hartshorne plant, replied:

"A. We were interested in the gossip that was going around that this cement plant was to be revived, and from a selfish standpoint, of course, we did not want to see another plant, another cement plant in the territory that we served, which had more than ample capacity already.

Q. Well, what was your purpose in passing that information to the other people in that chain of correspondence? A. Well, Mr. Reynolds, of the Information Bureau, was sending us clippings and information that he thought was—apparently thought was of interest to us, and I thought here was something in which the industry would be interested, and I reciprocated by passing the information on to him."[47]

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[45] Reiter, General Manager, the Institute (C) Tr. 4471-72.

[46] Com. Ex. 197 A, B, E, P, Q, V, Y.

[47] Brooke, Vice President, Monarch (R) Tr. 42322-23.

PART XIII

AETNA'S PRACTICES AND THE CREE INCIDENT

A. Aetna's Sales Policies.

1. Trucking

See discussion of trucking problems in Michigan, Part VI, Section L, pp. 1674-1705.

2. Saginaw—Bay City, Michigan Base

In December, 1932 Aetna and competitors filed bids with the Indiana State Highway Commission quoting destination prices none of which reflected Wyandotte as a base.[1] On March 10, Huron's base at Alpena was $1.40,[2] and on that day Huron established a base of $1.35 with discount at their packaging plant at Saginaw, Michigan,[3] eleven or twelve miles from Aetna's mill at Bay City, Michigan.[4] When on March 23, 1933 the Indiana Highway Commission called for bids, Aetna quoted prices calculated on Wyandotte as a base. This made Aetna lower at 9 destinations and it received an award of approximately 150,000 barrels.[5]

Cree, Aetna Sales Manager, testified that Aetna did not establish a basing point price at its mills but that Huron established a so-called Saginaw-Bay City basing point sometime after the Indiana Highway Commission contract[6] and that shortly thereafter Wabash dropped the price on

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[1] Com. Exs. 1856, 18 A, 20 A.

[2] Meyers, Traffic Manager, Huron (R) Tr. 33399.

[3] Id., Tr. 33398-99; Com. Ex. 3332: Universal Atlas price memo.

[4] Meyers, *supra*, Tr. 33399.

[5] Com. Ex. 18 A, 20 A, 1857.

[6] (C) Tr. 548-49. (The evidence, however, is that the base was established by Huron on March 10, 1933, see text above and also Lone Star's lists of price bases, Com. Ex. 1185.)

that base 10 cents.[7] He testified that Jennings of Wabash had criticized Aetna's bid to the Indiana Highway Commission and that Stone of Universal had talked to him over the telephone about it and "he said he thought it had disastrous results."[8] Cree again attributed the Wabash base at Bay City to the Indiana Highway Commission contract.[9]

On April 11, 1933, Johnson, President of Aetna wrote to Crapo, Secretary of Huron, protesting against Huron's base at Bay City (probably referring to Huron's nearby Saginaw silo base):

> "While here at the office today I have been talking over with Oscar Lingeman and Harold Cree regarding the question of the basing situation.
>
> It occurs to me that the fact of your establishing a base price at Bay City was somewhat of an unfriendly gesture. I can hardly see the reason for it, particularly in view of the fact that the price established is lower than your base price at Alpena of $1.40. It would be only reasonable that your base price at Bay City would be higher than your Alpena base. For example, in a somewhat similar situation, you have established a base price at Milwaukee of $1.50, and again at Toledo your base price is 10¢ above your Wyandotte base. I am perfectly frank in saying to you that I see no reason myself for your establishing any Bay City base price.
>
> There are other features of the base structure which do not appear to me to be reasonable. I have in mind particularly the Wyandotte base.
>
> This will give you pretty clearly my views on this subject, and I would very much like to have you give this matter your careful consideration, and would ask of you an early reply."[10]

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[7] (C) Tr. 553-54, see also Com. Ex. 1122 E-F; Meyers, Traffic Manager, Huron (R) Tr. 33402-03.

[8] (C) Tr. 547.

[9] (C) Tr. 629.

[10] Com. Ex. 19 A.

Johnson testified that Lingemann, Aetna's Vice President and General Manager, and others brought this matter to his attention and when asked whether his competitors spoke of it to him, answered "I do not know. I should not be surprised because it caused a good deal of furore."[11]

In a letter dated October 3, 1933 to Lingemann, Johnson summarized the outcome of a meeting in Detroit at which he and Cree were present together with Stone of Universal Atlas, John of Medusa, Rooney of Huron, Lucas of Petoskey, a representative from Marquette, and later Stroh of Wabash. He wrote:

[Italicized part quoted in Fdgs. Par. Ten (i)]

"It seems to me that the results of that conference should be a matter of record. * * *

2. I did admit that while we quoted regularly on the Indiana letting in December 1932 we did quote irregularly and different from the others in March 1933 by using the Wyandotte base. The result of that bidding has been rather disastrous, as I see it."[12]

Trouble broke out again in 1936. On July 9 Crapo of Huron wrote to Johnson:

[Italicized part quoted in Fdgs. Par. Ten (i)]

"I told Lingemann, at the time of our talk, that I was scheduled to leave within a day or two for the 50th Reunion of my Yale College class. I thought at that time that it would be possible for me to come back via Boston.

Before, I left, the Wabash had dropped the base at Bay City. Such incomplete knowledge as I have of this incident, led me to believe that Cree had high-jacked a Wabash contract in a manner similar to one taken away from the Wabash a year or two ago, and that the result at this time was the same as before; i.e. the Wabash dropped the base. In the

[11] (C) Tr. 979.

[12] Com. Ex. 20.

previous instance, the big brothers in the Cement Industry interested themselves in the matter, and accomplished a reconciliation which restored the base price.

It was my belief that you would be so busy on this matter, that it was not a favorable time to go to Boston to discuss the general situation.

It is too bad that Cree made this move, especially after his previous experience."[13]

Several weeks later, on July 29, 1936, Crapo, Vice President of Huron wrote to Affleck, President of Universal Atlas:

"Over the week-end, I have thought much about our talk on Friday, July 24.

Many completed instances of competitive irritation were discussed—some of very recent occurrence, and some have ancient dates. All the essential facts were known by your Company and ours. The discussion was not hurried—perhaps it was too long drawn out.

The obvious result of the talk disclosed that you and I were not in accord on many points:—in regard to what constitutes fair and considerate sporting competition between cement companies;—in regard to how the Industry and its Association gatherings can be helpful in obtaining for the Industry as a whole the greatest mill recovered price or net from the varying amounts of the yearly public consumption of cement;—and in regard to the obligation of sharing with our customers money saved by the adoption of proven money saving devices."[14]

His letter continued dealing specifically with two causes of "competitive irritation", namely, the Bay City base and the Milwaukee price structure. As to the Bay City base, Crapo wrote:

"The recent cut in price affecting Bay City, Michigan, territory was imposed by the Wabash

[13] Com. Ex. 909.

[14] Com. Ex. 418 A.

Company in order to make the Aetna Company suffer, for what appears to have been a high-handed acquisition by the Aetna Company of a Wabash road contract in Indiana, which had been signed by Customer and accepted by the Wabash. The effect of the Wabash Company in taking such independent action in a territory so far distant from its producing mills is to inflict a blight on the net earnings of the neighboring cement mills, who serve the Bay City territory. The Bay City territory is the 'back-yard' of these nearby mills. The Wabash Company has never delivered but a meager volume of cement in the Bay City Territory; and there appears to have been no incentive for the Wabash to work for increased cement tonnage there, because the price recovered at the Wabash mill was too low, even on bases considerably higher than the base now imposed by them, which is $1.40 at Bay City. However, on analyzing the present price, it would appear that the Wabash can maintain this unduly low price in the Bay City territory indefinitely. The Wabash Company can at least obtain a new dollar for the dollar which the Wabash Company spends to deliver an order to a customer, but apparently, there would be no money left from the transaction to pay interest, sales expense depreciation, etc. There have been substantial contracts made in this territory—since the new base has been fixed by the Wabash—by the 'back-yard' neighboring mills, which have already resulted in a substantially lower net price to them. If the Wabash Company should permanently blight the net in Bay City, it would be, in my opinion, an act that no cement gentlemen should do.

The Huron Company's net loss in dollars from this Wabash act in the Bay City territory is greater than that of the Aetna, because of tonnage, although it would appear that we were not in any way an offender—simply an innocent bystander.

The problem is—what can Huron do to better its situation? The Cement Association or the Cement Institute have developed no disinterested high priest, or no College of Cardinals, whose word would carry weight as in the case of the Pope to Father Coughlin. In fact, the interest of the Ce-

ment Association seems to be limited to the collecting of the greatest amount of dues, which the Association can spend to stimulate the use of cement. They have little interest in the fair play of their members, only in the prompt collection of dues. It would seem that some disinterested Big Brother in the Cement Industry—such a one as Mr. Lober—might smooth this seeming impasse out; but no such Big Brother has yet appeared.

The innocent bystander generally runs to a policeman for protection, but the Huron has reluctance in taking such a course without careful thought. What is the best law on which to rely? Before what jurisdiction should the matter be presented? The Federal Trade Commission, or the Court? It would appear that the Industry should be interested in any procedure initiated by the Huron. There probably will come a time when the Huron can no longer take this situation lying down. Its action should then be the wisest for the whole Industry. Independent actions, similar to that made by the Wabash Company, are likely to arise in the future in any locality."[15]

On the stand Crapo testified that he sent copies of this letter to Affleck, to Young, President of Lehigh, and to the President and Sales Manager of his own company.[16] Then, discussing the imposition of the Bay City base by Wabash and its consequences to Huron, Crapo testified:

"A. * * * Of course, the ethics of the cement business has changed, as time goes on. There was a long period where it was considered entirely improper for any mill to make a base on somebody else's mill.

Q. Yes. A. It was all right to make him a multiple base, if you wanted to, or not, but the idea of going out of your territory from Osborn, Ohio, and up to Bay City and putting in a base that worked back the long way——

[15] Com. Ex. 418 B-C.

[16] (C) Tr. 11091-92.

Q. That was what—— A. —very, very irritating.

Q. Was it considered unethical? A. It was not by anybody but me; it got our net.

Q. Well, did you figure that's what it was aimed at? A. No, it was not aimed at me; it was aimed at them.

Q. I mean, aimed at your net? A. No, they didn't want it at my net.

Q. You said it got your net. A. Well, I know, but always indirectly, because they were shooting at Aetna, and you know it was a case where one of the guns always aims at the sky and hits the calf——

Q. And they got—— A. And they got the calf that time.'"[17]

As to the alleged high-jacking by Aetna and the insecurity of a contract for future delivery in the cement industry, Crapo continued:

"Q. And you said something about them shooting at Aetna; what is the basis for a statement of that sort? A. Well, Aetna, which I think is around in the racket, sold the contract from Wabash in the Southwest part of Michigan.

Q. Will you enlarge on your statement about them stealing it, and what contract was it? A. I only mean the contract with Wabash, and deliveries were made on it, and then Aetna goes down and takes it away from them.

Q. Do you know what contract it was? A. No, I don't know the name of the contract.

Trial Examiner Norwood: What do you mean, take it away from them?

The Witness: Well, that—you see, a cement contract isn't a contract. Back in the early days every cement company you went into had a big sign there, 'A contract is a contract.' Well, they were kidding themselves. You only sell the goods after it is forwarded. You make the contract to carry it through, and then if somebody underbids

[17] (C) Tr. 11097-98.

you they don't—you don't get any more deliveries, and I never heard of a cement company suing anybody for the fulfillment of one of those contracts.'

Q. Is that the sort of a contract you refer to when you say Aetna stole it from Wabash? A. Well, I mean, yes, they went around, and after the thing was all going with a notification, I don't know how they got it, but, anyway, deliveries came out of Aetna.

Q. They cut the price? A. Well, I don't know, they got the contract.

Q. Do you know anything about how the dispute was settled? A. Well, the vindicative—if you use that word, base being put off for that purpose, disturbed them.

Q. Disturbed whom? A. Disturbed the general industry, and some in the general industry came over to Detroit to quiet that situation down.''[18]

Crapo stated that Stone of Universal Atlas led him to understand that Stone and others came over to Detroit from Chicago and quieted the situation.[19] Crapo did not know how this was accomplished but he believed that Wabash and Aetna again got on speaking terms.[20] Rooney, Vice President of Huron, saying that he was present on this occasion, testified:

''Q. Were any of Mr. Cree's alleged methods discussed at that meeting? A. Well, I don't know as there was anything particular directed at Mr. Cree. It was just a question of things—they discussed things that way—that the Wabash felt aggrieved that the Aetna Company had done to them in the way of some unethical business practices.

Q. The fact of the matter is that the dispute between those two companies was affecting the prices obtainable by the other companies, isn't that so? A. No—weren't any prices discussed.

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[18] (C) Tr. 11099-100.

[19] (C) Tr. 11100.

[20] (C) Tr. 11111.

Q. What was the interest of the other companies in the matter? A. Why, one of them had stolen some business from the other, that he had already under contract.

Q. What was the interest of the other companies between those two? A. Well, just a natural feeling that they like to—they hate to see good friends fall out, I suppose.

Q. Well, do I understand that the meeting produced some results as indicated by the fact that they all shook hands when it broke up? A. That's the extent of it, as I ever knew anything about it.

Q. What do you mean? That the meeting was—had no effect in solving any of the difficulties or problems involved? A. I don't think it did. I never saw any indication of it. I think they were quite satisfied to get around to a point where they would shake hands, that was something."[21]

Cree testified that Davis of Standard told him that the Wabash Company had reported to the Institute the contract which Aetna was alleged to have stolen, to which Cree replied:

> "If Harry Jennings or anybody else has got a contract we are not going to attempt to disturb that to get any business, because we are not that kind; and I would like to have him show that to me because these people will want cement pretty soon."

Cree stated that he remained in his office on the day of that conversation until 6:00 o'clock and that Davis called him back and said that Jennings refused to show his contract but he thought that he had one, to which Cree then said:

> "Well, I don't know what to do. We have accepted this contract and you say that Jennings reported it to the Cement Institute. I am not a liar, and I tell you that we didn't know of that because we weren't getting those particular contract reports. If Jennings will show me that he has a contract he [the buyer] won't get a pound, as far as I am concerned."

[21] (R) Tr. 3707-08.

He heard nothing more of the matter and when the buyer ordered delivery Aetna shipped the cement.[22]

Calvin testified that after he became General Manager of Aetna, the company made its own base price at its Bay City plant.[23]

[3. Alleged NRA Code Violations

On April 27, 1934 Peerless filed a complaint against Aetna with the NRA Code Authority, alleging violation of Article X, Section 3 and Article IX, Section 1,[1] in that Aetna sold a contract for delivery at Dearborn, Michigan, whereas the job for which the cement was sold was at a point some twenty miles distant at which higher delivered prices were on file. Cree explained that this was a road job for the Ford Road in the Ann Arbor district near an inland settlement called Dixboro and that by error due to the similarity of names the contract was recorded at Dearborn. The price at Dearborn was $2.25 and at Ann Arbor, $2.29, and the price at which Aetna sold the job was $2.29.[2]

When so advised, Peerless replied to the Code Authority, saying:

> "We believe that a careful investigation of this situation by the Code Authority will reveal facts that are at variance with the statements made by the respondents."

and referred to information derived from representatives of the contractor.[3] Further correspondence ensued.[4] On June 12, 1934 Rader, Chairman of the Code Authority,

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[22] (C) Tr. 11482-83.

[23] (R) Tr. 30044.

[1] Resp. Ex. 2428; Com. Exs. 1016, 557.

[2] Com. Ex. 1007.

[3] Resp. Ex. 2426.

[4] Com. Ex. 986; Resp. Exs. 2425, 2424 A-B, 2423.

wrote to Peerless that the Code Authority had received from Aetna a photostatic copy of the specific sales contract covering the sale in question and that "the information developed by our investigation covering this matter does not indicate violation as charged."[5] Urged by Peerless to pursue the investigation further, the Code Authority replied:

> "The Code Authority is without power to follow your suggestion and we, therefore, feel that within the limits of our authority we have completed our investigation of this complaint and such investigation does not indicate to us a violation of the Code."[6]

Peerless again complained of Aetna, charging a violation of Article X, Section 4, Paragraph (c) of the Cement Code which prohibits payments or allowances not extended to all purchasers in like circumstances. The specifications of this charge do not appear in the record. Cree responded to the Code Authority and the matter appears to have been dropped.[7]

On June 21, 1934 Rader wrote to Aetna, Peerless and Wolverine, informing them that they were making truck deliveries in Michigan without having filed conditions of such sales.[8] Cree answered in effect that Rader was mistaken and that his quotations filed covered both trucking and carload shipments and the terms and conditions were disclosed.[9] Rader found that their files disclosed no filing covering truck conditions but that the quotation blank accompanying Cree's letter made the matter clear and this was accepted.[10]

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[5] Resp. Ex. 2421.

[6] Resp. Ex. 2418.

[7] Com. Ex. 1020 H.

[8] Resp. Ex. 2636 D.

[9] Com. Ex. 1008 B.

[10] Com. Ex. 1008 C-D.

In May 1935 Alpha complained to the Code Authority that Aetna had bid a price at Algoma, Wisconsin to the United States Engineer Office, Milwaukee, which was not on file. Apparently an error occurred due to the use of land grant rates.[11]

Fowley, Secretary to Lingemann, the General Manager of Aetna, testified that someone from Universal called Aetna on the telephone and talked with O'Neal, the accountant, and tried to tell him how to bid on the Algoma letting. O'Neal told him that he knew how to bid and hung up.[12] Upon notice of the complaint, Cree wired and wrote to the Engineer Office stating that there was a mistake in the price quoted and asked permission to withdraw the bid.[13] The United States Engineer Office replied, stating:

> "There is no authority to permit withdrawal of your bid because it may not be in accordance with cement code requirements as the bid received includes the required certificate as to code compliance properly signed."[14]

Writing to Reiter, Chairman of the Code Authority, on May 16, 1935 in reference to this matter, Lingemann said:

> "I hope when you submit this to Mr. Fellows that he will accept our answer, as it is the facts in the matter and we are so reporting to our President, Mr. Johnson.
>
> Outside of a vague idea, we knew nothing of Land Grant rates. We have repeatedly asked both the Pere Marquette and the Michigan Central representatives to explain to us just how we could arrive at these rates and they have both informed us that the Government would not submit this information."[15]

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[11] Com. Ex. 986 B-C.

[12] Fowley, Clerk, Aetna (C) Tr. 896-901.

[13] Resp. Exs. 2028, 2029.

[14] Resp. Ex. 2030.

[15] Com. Ex. 986 C.

And in a letter dated June 28, 1935 to Rooney of Huron, Johnson wrote in reference to the Algoma quotation:

> "* * * It is a fact that common horse sense would prompt us not to violate the Cement Code (and on a very small order) and especially one with the Government on the purchasing end. This is a regrettable error. I endeavored with all mental resources at my command to co-operate with the Code Authority in refusing to accept this business from the Government, bringing up the point to the Government that we unknowingly had violated the Code, and therefore, they should permit us to withdraw as we wanted to comply with the Code, which is compulsory on Government work. It is with regret that we realize that one of our competitors has chosen to cite us in this small violation, as this is the first time such a thing as this has happened with us."[16]

4. Aetna's Distributor

Cree testified that the Limestone Products Co. was a distributor for Aetna at Menominee and Green Bay, Michigan, and Racine, Wisconsin, operating under his direction and selling to dealers and contractors.[1] He testified:

> "Q. But you also said they did not buy your cement, is that right? A. No, they distributed our cement, and as they did, we paid them for their particular service of unloading, warehousing and re-distributing by truck or train.
>
> Q. So much per barrel? A. So much per barrel, paying as we go."[2]

This arrangement appears to have begun shortly prior to 1933, and the sales effected through this distributor

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[16] Com. Ex. 417 BB; see also Com. Ex. 28 A: Memorandum by Cree to Lingemann dated May 20, 1935.

[1] (C) Tr. 762-63.

[2] (C) Tr. 765.

caused adverse criticism. Johnson, writing to Lingemann, on October 3, 1933, concerning a conference on the previous Friday, at which he and Cree met Stone of Universal Atlas, John of Medusa, Rooney of Huron, Lucas of Petoskey, a representative of Marquette, and Stroh of Wabash, in his summation of the results of that conference, said:

[Italicized part quoted in Pdgs. Par. Ten (i)]

> *"4. As to the Milwaukee situation and Pipkorn, that was discussed and we agreed that we should not allow a jobber to buy a large amount of cement, with an idea that he could use it later on to burst open the market; if he did, then in the future we should be careful as to how much cement we sold him, and try to control the situation. I appreciate that when a man buys merchandise and pays for it, it becomes his own and we cannot very well tell him what he shall do, but we must try to prevent a condition of this kind again."*[3]

Writing on October 5, 1933 to Stone, Universal Atlas' Sales Manager at Chicago, Cree referred to the company's arrangements with the Limestone Products Co., owned and controlled by Mr. E. P. Smith, as follows:

> "We are very pleased to realize that we are doing business in Wisconsin through our fine distributor, Mr. E. P. Smith, located at Green Bay and Menominee. This gentleman is a business man of the highest type and understands thoroughly the condition of the cement business. Mr. Smith has done nothing that has not been in harmony with the present status of affairs in Wisconsin and you may be sure that this will continue. Anything to the contrary that you have heard is not correct, and if there is anything in the future that you are in doubt of, I would appreciate it very much if you would come to me first instead of going to Mr. Smith."[4]

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[3] Com. Ex. 20 A.

[4] Com. Ex. 21 B.

In a memorandum dated October 28, 1933, presumably prepared by Lingemann, of a telephone conversation with Johnson, referring to a meeting at the Book Cadillac Hotel in Detroit on October 24, it is stated: "We will also eliminate distributors, and either sell our cement direct or through dealers."[5]

Apparently the intention to discontinue sales by distributors was disregarded. [The minutes of the meeting of the Code Authority on March 13, 1934 recorded a statement by the chairman that information had been received indicating that a member of the industry was marketing cement in Michigan and Wisconsin through a distributor for resale at a price not filed with the Code Authority, and it was declared to be the sense of the meeting that the member was in violation of Article 10, Section 4, paragraph (j) of the Cement Code and that any complaint received should be handled on that basis.[6]]

Cree, in a letter to Lingemann, dated May 20, 1935, in replying to "points raised by Mr. Johnson in his letter of May 17th" states that Smith had just leased a new warehouse at Green Bay and within two weeks would open a very fine warehouse at Racine, which would develop considerable tonnage. He then goes on to say:

> "As far as this Mr. Smith is concerned—as I said before, he is a very high type of business man. He is very influential, has numerous friends, and is financially sound. I might say, however, that he is very much surprised to realize that our competitors have had so many detectives following his operations, and it is very pleasing for us to realize that they have never been able to find anything really irregular about his distribution. He is also disappointed to hear stories from some of his old acquaintances, which stories are to the effect that certain cement Companies have temporarily located

[5] Com. Ex. 22 A.

[6] Com. Ex. 631 B.

themselves there to compete with him for the main purpose of attempting to drive him backward.'"[7]

Cree identified a memorandum dated October 25, 1935 as one received from Johnson concerning a meeting in Boston between Johnson and Conkrite of Universal Atlas and John of Medusa.[8] The memorandum, without the addition of Cree's pencilled notations, said:

> "At a meeting today it was considered to be to the best interests of all parties concerned that the Aetna Portland Cement Co. should discontinue distributors. They would continue their practice now—as they will in the future—of shipping their cement by boat to their various destinations, putting that cement in warehouses, but they should sell that cement by their own selling force, and the bills for that cement should be made from the head office at Detroit. That is to embrace all wholesale points now, and distributors should be eliminated, meaning that in the future no distributors should be appointed without that permission of the President.
>
> The question of Mr. Smith and the Limestone Products Company is one that must be worked out, along on this basis. If Mr. Smith can work in accordance with our instructions, and the billing and selling be done by the Aetna Company, that is a point which the others don't like, but we must consider it; and if he cannot work in that line, then we shall have to do without him.
>
> In shipping cement into the upper Peninsula, it should go in carload lots, and no truck deliveries be made.
>
> All of this seems to be a step necessary for better harmony and better understanding, and we hope for general better satisfaction.'"[9]

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[7] Com. Ex. 28 A-C.

[8] (C) Tr. 683.

[9] Com. Ex. 34.

Johnson was examined as to this memorandum and testified:

> "Q. 'That Aetna should continue distribution.' Whom did you have in mind there besides Aetna among the phrase, 'all parties concerned?' A. Well, to be perfectly frank with you there, I had it in my mind more especially the concerns who were doing business up there in that locality.
>
> Q. Who were they? A. I don't know. I knew Universal Atlas was one. Someone else might have been on there.
>
> Q. Mr. Conkrite was the Universal Atlas man, wasn't he? A. Yes, he was. If we went up there and distributed cement and we had been distributing it, I found out afterwards through our warehouses, in a way that was detrimental to our own health and our own vitality and our own profit, then I thought we had better cut it out, and that is what we did."

and further:

> "Q. You said further, 'All of this seems to be a step necessary for better harmony and better understanding.' A. Yes, sir.
>
> Q. Better harmony with your competitors? A. No, sir, better harmony between my organization and an understanding with me and a harmony to me, and by God, they were out of step on the harmony game."[10]

Subsequently Conkrite called Cree on the telephone and Cree had Fowley, the secretary, make a transcript of the conversation by listening in. The conversation, as so reported, stated in part:

> "Mr. Cree: We have to talk with Mr. Smith, as we told you and you accepted our statement in Chicago—that Mr. Smith was a part of us. I do not see that it would do any good to come here before we talk to Smith and we can see you at the same time we come to Chicago to see Mr. Smith. Mr. J. B. Johns was here a few days ago.

[10] (C) Tr. 998-99.

Mr. Conkrite: Yes, he told me he had been there (here he goes on to tell what Mr. Johns said about the meeting with Mr. Cree and Mr. Lingemann.) Well, I called up to find out if you and Oscar were going to be there so I could come over and talk to you as Mr. Johnson asked me to do when I was in Boston and has since asked me if I had done so.

Mr. Cree: Well, I do not know what I could tell you if you did come to-morrow.

Mr. Conkrite: Well you have heard the story—you have the memo there, have you not, etc.

Mr. Cree: Well, I know that you have been down to Boston to see Mr. Johnson and I want to say that Mr. Johnson realizes that he is far away from the scene of action and does not understand all the rather peculiar things and details that are involved in the cement game and * * *

Mr. Conkrite: All right, I will tell Mr. Johnson that you say he does not know what he is talking about.

Mr. Cree: I did not say that Mr. Johnson did not know what he was talking about, Archie, and you know it. I said he was far away from the action and that he did not know a lot of the detail in regard to the rather peculiar things.

Mr. Conkrite: They are the things that cause all the hell.'"[11]

And later referring to Mr. Johnson:

"Mr. Cree: What did he tell you we would do?

Mr. Conkrite: 'Read your memo!! (Very angry) it says that you will give up trucking in the Upper Peninsula and that if something cannot be worked out satisfactorily in regard to our distributor Mr. Smith, that we, (meaning the Aetna Company) will have to get along without him. *You have the memo,* what does it say about trucking in the Upper Peninsula?'

Mr. Cree answered him the best he could under the circumstances and Mr. Conkrite said 'all right, I don't give a damn one way or the other about it'.

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[11] Com. Ex. 35 A.

They both decided that they were not getting anywhere and Mr. Cree told him that he would be in touch with him as soon as he and Mr. Lingemann talked with Mr. Smith. Conkrite mentioned *our* contract with Smith, saying 'I do not know what your contract is with Mr. Smith' and Mr. Cree took him up on that and asked him what contract and Conkrite said 'Well your contract or agreement with him', and Mr. Cree said 'oh, do we have a contract with him?'."[12]

In a letter to Lingemann, dated October 28, 1935, Cree referred to Johnson's memorandum of the meeting in Boston and a meeting which Cree held with Conkrite and Smith in Chicago. In the course of the letter, Cree said:

"Mr. Conkrite's attitude towards our distribution of cement in Wisconsin was to the effect that the new [sic] Mr. Smith had been getting the proper price and that any little difference of thought as to the job operations were really mole hills that some people were developing mountains from; and the conversation ended with Mr. Conkrite expressing his pleasure in meeting Mr. Smith and augmented the occasion by his statement that he now knew that when he spoke to Mr. Smith he was speaking to the Aetna Portland Cement Company.

• • •

We have stated these facts before any discussion of the memo from Mr. Johnson because of the conflicting points. As far as Mr. Smith is concerned, he distributes our cement according to our instructions which are 100% in accordance with the conditions in that territory and any deviation that has occurred in this distribution has been nothing as compared with the so-called errors made by our competitors in this district. This is the truth. Our competitors do not care to have us in that district under any consideration or condition and of course, it does hurt them to realize that they can't point their finger at us to the extent of a cut price, etc.

[12] Com. Ex. 35 B-C.

Mr. Smith has been in business for years and has a fine business developed. This business is consisting mostly of dealer tonnage and of course, that's what hurts our competitors because of its more permanent make up.

There is no reason at all why the Aetna Company should give up this proper distribution in Wisconsin, in fact, we think it would be better to have our competitors furnish us with the bombs to place in our boats. We did offer at the Meeting in Detroit, to change the billing, but we did say that the conditions would be approximately the same. As far as our operating our own selling force in Wisconsin, the cost would be prohibitive and nothing would be accomplished. This would be prohibitive, not only from the cost standpoint but by the inability to get the business under any condition. Mr. Smith as stated before, has a definite quantity of loyal customers and if he does not handle our cement, he no doubt will take on some other brand, in fact, we know that he had thoughts of taking on Ford cement and we had him eliminate that from his mind.

* * *

This memo would suggest that we do everything that our competitors say that we should do which we know is to their benefit rather than to ours and it makes us realize that they and not ourselves, are running our business, so naturally, to put over their demands, they would hold out an increased price in cement. That is becoming smart business. We feel that we are not big enough to disturb conditions to the extent that we are going to be instrumental to have companies like the U. S. Steel Corporation and the Huron Company to raise or lower their price. We believe that this price condition will be done just when they want it to be done and not before."[13]

On October 30, Cree again addressed Lingemann, giving expression to the importance of Smith because of the tonnage with dealers which he controlled and then referred

[13] Com. Ex. 37 A-B.

to a change of opinion by Conkrite which greatly surprised Smith and Smith's desire to meet with Johnson in Chicago or Detroit.[14]

On November 14 Johnson wired Linegmann:

> "JUST RECEIVED TELEPHONE MESSAGE FROM SMITH OF LIMESTONE PRODUCTS CO WANTED TO KNOW WHAT I WAS GOING TO DO REGARDING HIS POSITION TOLD HIM TO CONTINUE AS HE WAS THAT WE WOULD NOT CHANGE THAT ARRANGEMENT FOR ANYONE AT PRESENT TIME HE SEEMED QUITE SATISFIED HAVE WRITTEN"[15]

At a meeting in Chicago in December, 1935, at which Johnson and Cree, with a representative of a number of competitors of Aetna,[16] were present, Johnson read a document entitled "Policies of the Aetna Company" in which he stated:

> "We have one distributor only, and that is the Limestone Products Company. We have a contract with these people which will run for sometime yet, and which we will honor.
>
> We will not add any more distributors without first the approval of the general manager and the president."[17]

In a letter by Johnson to Lingemann, dated December 13, 1935, reviewing this meeting, Johnson wrote:

> "As to distributors, have no more of them, unless we all get together and decide it is for the best interests."[18]

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[14] Com. Ex. 38 A-B.

[15] Com. Ex. 40.

[16] *Infra*, p. 2214.

[17] Com. Ex. 44.

[18] Com. Ex. 45 C.

5. Aetna's Dealers

a. Indiana Farm Bureau

Hogan, President of Lone Star testified that in April or May of 1936 or 1937 Pierson, Vice President of Lone Star, showed him a copy of the Aetna's sales policy, in which they declared that they were going to sell only to established dealers at places where dealers had yards, but that they were selling the Indiana Farm Bureau at a number of places where it had no yards and creating quite a furore among dealers. The following month there was a meeting of the Portland Cement Association and Pierson again brought the matter to Hogan's attention and Hogan spoke about it to Johnson who tried to discuss it with him but he declined to do so because he knew no more about it than what Pierson had told him. After the meeting he found Johnson with Cree waiting for him and insisting upon discussing the matter.[1]

Referring to Cree, Hogan testified:

> "The first thing he said, what you want to do is keep us from selling the Indiana Farm Bureau. I said, not on your life, I have no interest. I just told Mr. Johnson what our vice-president told us about what kind of sales policy you have announced, and just what was going on.
>
> Mr. Johnson said, I want to get this straightened out. He said, where are they dealers. I said, I haven't any interest in it at all, and I haven't the least knowledge of where they are dealers.
>
> Then he said, who in your company would know? And I said, Mr. Pierson, in charge of our Indiana district, would be the man for you to talk to.
>
> He said, could Mr. Cree speak to Mr. Pierson. I said, certainly; he is at this meeting, probably he and Mr. Cree could get together at the meeting.
>
> But Cree said, not then, but probably he would see him later.

[1] (R) Tr. 34569-71.

I said, that's all—I know nothing about this detail at all; I couldn't discuss it.

Q. Aside from what you have told us, Mr. Hogan, did you, at any time or in any way, ever endeavor to persuade the Aetna Company not to sell Indiana Farm Bureau? A. Absolutely not, no.

Q. Then did you have any subsequent discussions on this subject? A. I had none whatever with anybody."[2]

Cree testified that he met Hogan, President of Lone Star, at a cement meeting in New York and Hogan told him he was going to have Pierson, Vice President of Lone Star go to see him concerning sales made by Aetna to the Indiana Farm Bureau.[3]

Pierson called on Cree sometime shortly before the latter's discharge and Cree talked with him about Aetna's sales to the Farm Bureau. According to Cree, Pierson suggested that there were three distinct towns where the Indiana Farm Bureau might properly be sold as a dealer, but not for delivery elsewhere. However, Cree declined to assent to this statement.[4]

In a memorandum of Cree's dated August 29, 1935, nearly a year before this conversation with Pierson, he states: "We have been acquainted with Farm Bureau activity for years and have endeavored at all times to guide them properly. * * * Mr. Hughes of Lehigh and Mr. Pierson of International, who have inquired, will soon be informed as to our opinion in detail, of this operation."[5]

The objection to Aetna's sales to the Indiana Farm Bureau appears concretely stated in a letter by Slagle, Secretary-Treasurer of The Indiana Lumber & Builders'

[2] (R) Tr. 34571-72.

[3] (C) Tr. 531.

[4] (C) Tr. 523-27.

[5] Com. Ex. 32.

Supply Association, dated May 23, 1936, to Carnahan, Secretary of the National Lumber Dealers' Association, in which Slagle wrote:

> "As you perhaps know the Indiana Farm Bureau has made arrangement to purchase cement from an out of State mill, the Aetna Portland Cement Company, of Michigan, who are the only ones who would make this connection. The Farm Bureau has five yards in the State but under the arrangement made with the Aetna Company they will quote on carload cement business any place in the State of Indiana. They have made an arrangement with the State Procurement Officer to receive invitations to bid in the entire State and with this arrangement are taking practically all of the cement business."[6]

Carnahan brought the matter to Reiter's attention and Reiter replied on May 28, 1936:

> "I am afraid that I can offer no suggestions. Individual sales policies of cement companies usually do not include sale of cement to a dealer f.o.b. another dealer's destination, but the matter you call to our attention is outside the province of The Cement Institute."[7]

Cree apparently made some effort after or about the time of Pierson's call to limit the shipments to Indiana Farm Bureau. Under date of June 26, 1936 Fricke, writing for the Indiana Farm Bureau, says:

> "Confirming our telephone conversation of today, I was certainly surprised to learn that we are not to bid on any more Government jobs."[8]

Again on July 17, 1936, Fricke wrote to Cree:

> "It has just been called to my attention that you called Mr. Ervin yesterday telling him that you could

[6] Com. Ex. 202 AA

[7] Com. Ex. 202 Y.

[8] Com. Ex. 50.

not ship cement to Howard and Clay County. Now, Mr. Cree, we had a definite understanding with you and Mr. Fuelling that you would ship cement to all of our county units that have a warehouse and a place of business, providing these units stocked cement. For the last year you have been shipping cement to Howard and Clay County, and we are expecting you to continue to do so.'"[9]

The Indiana Farm Bureau charged that Aetna failed to fill a number of orders in July 1936 which Aetna had previously stated it would handle.[10]

Calvin who assumed the management of Aetna in 1936 and later became its President, testified that the Aetna Company was, at the time of his giving testimony, selling the Indiana Farm Bureau and continued:

"Q. Would you tell us whether or not any pressure has been put on you by your competitors to discontinue selling the Indiana Farm Bureau? A. None whatsoever has been put on us.

Q. Would you tell us whether or not any competitors have ever tried to get you to discontinue selling the Indiana Farm Bureau? A. None have ever tried to.

Q. Did you ever discuss with your competitors the question of giving up or discontinuing selling the Indiana Farm Bureau? A. I have not.

Q. Now, the record shows Mr. Cree selling the Indiana Farm Bureau at three or four points in the State of Michigan. How many points did you sell them to after 1936 after you came to the company? A. Did you say that the record showed he was selling in the State of Michigan?

Q. In the State of Indiana? A. Now, may I have that question again, please?

(Question read.)

A. Probably twelve or fifteen points.

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[9] Com. Ex. 60.

[10] Com. Exs. 60 A, 54, 55, 57-79, inclusive.

Q. At how many points do you sell them today? A. Roughly, thirty-five or forty.

Q. Will you tell us, if you know; whether your competitors sell them at as many points as you sell them? A. No, I don't think any competitor sells them at as many points as we sell them.

Q. Would you tell us whether or not you have any objection to selling the Farm Bureau located in any other State? A. No, I have no objection if they will apparently make us good dealers, I will be glad to sell them.

Trial Examiner Norwood: How long have you been doing that?

The Witness: Ever since I came with the Aetna Company."[11]

And further as to sales to farm bureaus wherever opportunity afforded, Calvin testified:

"A. I have sold them all the cement that I could sell them ever since the first day I came with the company right up to now."[12]

Other companies also sell farm cooperatives if they carry stock for resale.[13]

b. Invading Dealers' Territory

In an unsigned memorandum, dated November 21, 1935, which Cree testified Mr. Johnson sent to Lingemann, who referred it to him for answer,[1] the writer drew attention to the fact that on November 18 Huron had made a new base price which lowered the prevailing price in the Grand

[11] (R) Tr. 30156-57.

[12] (R) Tr. 30161-62.

[13] South Dakota: Hartley, Sales Manager (R) Tr. 41504-06; Resp. Ex. 3117 A-B; Consolidated: Calvin, formerly Sales Director (R) Tr. 30380.

[1] (C) Tr. 727.

Rapids-Muskegon area by 20¢ per barrel.[2] The communication went on to refer to the policy of refusing f.o.b. mill bids to Government procurement offices for WPA work[3] and then referred to a number of tabulations enclosed of bids made by the McCall Lumber Company, at Royal Oak, Michigan, for sales at a number of different places in Michigan alleged to be outside McCall's territory and similar bids by Standard Building Supply Company, of Grand Rapids.[4] It was then charged that two of these bids when used in connection with Government land grant rates affected a cut below the market at one destination of 12¢ and another of 5.6¢ per barrel. The communication then continued:

> "When a dealer thus bids and makes delivery outside his logical territory, the industry can accept his action only as representing a distributorship. This practice on the part of Aetna dealers is now encouraging other dealers to attempt such procedure, even without any authority from the Companies from whom they regularly purchase.
>
> With all other Companies definitely opposed to the 'point of origin' or mill price selling, and likewise opposed to permitting a dealer to sell and distribute promiscuously outside his regular territory, the reductions in price thus made by the Aetna Company could not logically be met except by the lowering and establishment of a new current destination price at markets affected.
>
> The entire industry in Michigan and contingent territory, for these bad practices do not long recognize State boundary lines, is much concerned over these acts on the part of the Aetna Company and their dealers. We already have the results of what one Company has elected to do to remain competitive, and I can only leave to your conjecture what the

[2] Com. Ex. 42.

[3] See Part XIV, Section D, pp. 2385 *et seq.*

[4] Com. Ex. 42-D-S.

further effects of a continuation of such practice on the part of the Aetna Company may produce.'"[5]

On December 2, 1935, Cree prepared a rambling three page response to this memorandum.[6] This evidently failed to satisfy Johnson because in the meeting at Detroit, in which he stated the Company's policies in the presence of the representatives of a number of competitors, he stated:[7]

"We do sell to dealers. They buy our cement and pay for it promptly and it becomes their property. It will, however, be our desire to have them maintain prices and conditions in the various localities where they operate and confine themselves to the districts in which they are entitled to operate.'"

6. Warehouses

Cree identified[1] a map of Michigan with the outline of Lake Michigan on which there was marked the location of warehouses. It showed distributing points for Aetna cement at Saulte St. Marie, Menominee, Bay City, Port Huron, Detroit, Grand Haven, Fenton and Saginaw, Michigan, Toledo and Cleveland, Ohio, and Green Bay and Racine, Wisconsin.[2] The warehouses, Cree testified, had been developed by him since about 1930,[3] and each warehouseman was paid a commission upon sales shipped from his warehouse.

In his notes upon a meeting in Chicago in October, 1933, with a number of Aetna's competitors at which trucking was the principal subject of discussion, Cree states:

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[5] Com. Ex. 42 B-C.

[6] Com. Ex. 43 B-D.

[7] Com. Ex. 44 A-B.

Cree, Sales Manager, Aetna (C) Tr. 742-48.

[1] (C) Tr. 510.

[2] Com. Ex. 17.

[3] (C) Tr. 512.

"The Aetna Company was criticized on account of the fact that they have established the carrying of cement in package form to destination warehouses controlled by themselves and located at points where their competitors have not elected to establish silos. We claim that the destination price is the main thing to worry about and as long as the Aetna Company are meeting the destination price it is not unfair competition that they should have the privilege of any economical location that they have developed. If the Aetna Company did not choose to follow a leader and go to points like Milwaukee, where there are millions invested in silos on account of this 'sheep running' proposition of following the leader it appears to us that it is the Aetna Company's business and no one's else. At the present time we are located at Green Bay, a spot which is the gateway to Northern Wisconsin and Minnesota, a spot where it would have been much better for other cement companies to have located than in spots where they decided to."[4]

Questioned about this, Cree stated that he had heard John of Medusa and Calvin, then of Consolidated, as well as perhaps others, criticize Aetna's warehouse method.[5] Writing to Johnson on February 1, 1935, Cree said that it was the intention of others to force Aetna to close its operations at Grand Haven, Menominee and Green Bay;[6] warehouses which were under the control of Smith.

In the statement of policies, dated December 6, 1935, and read by Johnson in the presence of representatives of a number of competitors, Johnson says:

"Wherever we have a warehouse, we intend to sell our own goods by our own men, and do our own billing.

Whether or not these warehouses are profitable, is a matter which we must carefully watch."[7]

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[4] Com. Ex. 23 A-B.

[5] (C) Tr. 614-17.

[6] Com. Ex. 24 A-C.

[7] Com. Ex. 44.

In his letter to Lingemann, following upon this meeting, and commenting on his declaration of policies, he says:

[Italicized part quoted in Fdgs. Par. Ten (i)]

"I call your attention to the second page—first paragraph—as it was read at that meeting. Now in that first paragraph, we speak about selling to dealers. It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except into his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him.

* * *

As to these warehouses, there is no use of discussing Menominee, Green Bay or Racine, because those are all under Mr. Smith's jurisdiction, and we are going ahead with him, and that settles it; but Harold should get in touch with Mr. Smith (or you should) and ask him to cooperate with us just one hundred per cent, and not to do anything in any way that would look as though he were giving any advantage to any buyer of cement, either in the way of commissions or an added amount of other materials. I can't believe that Mr. Smith would do that. I enjoyed meeting him—I think he is very shrewd, very keen, very smart—and he is likewise, in my opinion, very honorable.

* * *

[Italicized part quoted in Fdgs. Par. Ten (i)]

CLEVELAND

See J. B. John about this. Have that O.K.'d, and as soon as it is arranged, write me, and ask Mr. John to write me.

PORT HURON

See Mr. Russell, and get that straightened out; and when it is, and it is O.K. for both of you, write me and have Russell write me.

As you see, I have started on this thing and I am going through with it.
DETROIT is O.K.

SAULT ST. MARIE

Withdrew from there.

GRAND HAVEN AND TOLEDO

See what you can do in both places that will be satisfactory. It may be wise to withdraw from both places."[8]

Upon the stand, Johnson testified that he directed Cree and Lingemann to see John about the Cleveland warehouse because he had asked John what he knew about warehousing and John had told him and he wanted Cree and Lingemann to be also advised. He had told them to see Russell[9] about Port Huron, because Russell had experience there.[10] Johnson testified that he was not in agreement with Lingemann and Cree concerning the use of warehouses and then continued:

> "I was stared with a loss at one time, as I saw it on my audit report of I think about $180,000 for warehousing expense and I was disturbed by it."[11]

Johnson testified that warehousemen split their commissions with dealers and other purchasers who were their particular friends and that as the result they cut the price of cement in that market, reducing the price in that market when that happened.[12]

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[8] Com. Ex. 45 B-C.

[9] Russell, Vice President, Peerless.

[10] (C) Tr. 1009.

[11] (C) Tr. 1051.

[12] (C) Tr. 1087-88, 1105.

Calvin stated that when he came with the company, it had warehouses at Cleveland, Toledo, Detroit, Grand Haven, and that he abandoned them. As to his reasons, he testified:

"A. Because they were unprofitable, and the cement could be distributed in those markets, direct by truck, much more cheaply than it could be taken there by boat and put in the warehouse.

Q. How did you know this? A. Because we put some books in there that showed costs. The cost, I think, to Detroit was about 62 cents a barrel by boat, and through the warehouse onto a job. We trucked in there direct for about forty or forty-two cents a barrel and saved around twenty or twenty-two cents a barrel.

Q. Did your customers find it more satisfactory from the point of view of the quality of the cement that you truck direct to the job? A. We had fewer complaints; when we put cement through that warehouse it had, naturally had to go in in big quantities, and would get warehouse set, get wet, some of the sacks would be broken and resacked, and when the workmen re-sacked the cement they were careless and got foreign matter into the sack, like old cigarette stubs, and once in a while a tobacco can, or something like that, and the customers complained, and when we trucked direct from the plant we had no such complaint because the cement was always fresh.

Q. Did you consider the Detroit warehouse the most economical warehouse which you discontinued? A. It was by far the most economical.

Q. And yet you made a saving of 20 cents a barrel by shipping direct by truck,—about 20 cents? A. That is right."[13]

Giving the reasons applicable specifically to the warehouse at Grand Haven, Calvin testified:

"The facts are that the warehouses over there continually lost money; that I found the inventory

[13] (R) Tr. 29959-60.

was about 2,500 or 3,000 barrels short; that the person who had been operating the warehouse had not reported to us all the sales that they had made, and as a consequence not all the money that the company was entitled to collect; that we had a lot of trouble in storing cement in the warehouse, because it moved so slowly that it became warehouse set; that the man who was operating the warehouse, Mr. Robbins, was not making any money out of it, and he was sick of it. The whole thing was just a poor business proposition, and I closed it up as quickly as I could.'"[14]

As to the failure of the warehouse operated by the Sault Sand & Gravel Co., he testified:

"A. Well, when I went with the company I found that the people at the Sault Sand & Gravel Company owed us considerable money, I think three or four thousand dollars. I went up and had a talk with them personally, and found that it operated a warehouse for a while, that they were taking a severe loss on it; and although legally they probably owed us this money, they tried to make out a case that we ought to not try to collect it, or ought to stand part of it, or something of that nature.

The warehouse had been closed up, and they claimed that it did not work the way Cree represented it would. He said they could sell a great deal of cement. Nothing worked out the way Cree told them. The cement hardened and they couldn't sell it. They had trouble with it, they took a loss, and all that. So I tried to collect the money, and I couldn't collect it. Finally I wrote part of it off the books."[15]

As to the unsatisfactory warehouse condition in Cleveland, he testified:

"That warehouse is located up the Cuyahoga River, and the depth of that channel is such that

[14] (R) Tr. 29985-86.

[15] (R) Tr. 29986-87.

we could only load the boats to half capacity, and you have to hire a tug sometime, too, to track it in. The dock—the wharf was a rickety wharf. The cement had to be unloaded, put on little hand trucks, and taken up the wharf maybe two or three hundred feet, maybe more, into the warehouse, a very poor building.

Then when it was taken out these motor trucks had to back down a narrow alley, downhill, and be loaded to go out again.

It was just about the most expensive, most unbusinesslike proposition that I could imagine. Why, it was just absurd. It cost so much money.

So after I got there I don't think we ever put another bag of cement in there. We got rid of what we had in there, got from underneath the contract we had with a man that owned the warehouse, and we quit that in a hurry.

Q. Did you discontinue that warehouse as the result of any agreement or conspiracy with your competitors? A. Nobody said a word to me about that warehouse."[16]

Calvin testified that he did not discontinue these warehouses as a result of any pressure from competitors or any agreement with them or at their suggestion,[17] and that on the contrary, "I am free to sell the cement the way I see fit."[18]

B. Aetna's Management and Cree's Discharge.

The Findings in Paragraph Ten(i) state:

"In at least one case failure to conform fully to the pricing and marketing practices established by respondents had results of a personal nature to executives of the com-

[16] (R) Tr. 30078-79.

[17] (R) Tr. 30010.

[18] (R) Tr. 30163.

pany concerned. Harold S. Cree became sales manager of Aetna in April 1910 and Oscar Lingeman was general manager of that company for many years." The Findings then continue, citing several matters hereafter set forth, and after referring to Mr. F. R. Johnson, President of Aetna, they state: "Mr. Johnson went to Detroit, discussed the situation with competitors, and then obtained the resignation of Mr. Lingeman and discharged Mr. Cree." After referring to the appointment of Ben Calvin as Manager of Aetna, the Findings continue: "Mr. Calvin proceeded to conduct the affairs of Aetna in a more cooperative manner, frequently discussing the policies and prices with competitors."

The matters set forth in Section A above together with the evidence in this Section bear upon the change of Aetna's management.

Harold S. Cree called as a witness for the Commission in 1937 testified that since July 1936 he had been engaged in "trying to develop a representative business in sewer pipe and lime and incidentals like that that go to harmonize with building construction," and that prior thereto he had been connected with Aetna for approximately 26 years. His testimony continued:

> "Q. In what capacity? A. In the capacity of sales manager, traffic manager, advertising manager, and you might say general counsel as to the welfare of the progress of that particular company.
>
> Q. How long were you sales manager of the Aetna Company? A. Practically since the time they started.
>
> Q. Will you give a brief history of the development of the Aetna Company's business as it developed under your sales managership? . . .
>
> . . .
>
> The Witness: Well, when I started with the Aetna Portland Cement Company, it was a little plant, practically an obsolete plant in the little town of Fenton, Michigan, outside of Detroit, and

about 45 miles between Flint and Saginaw, and just about 20 miles the other side of Pontiac. At that time it did not have any particular customers or business, it was just about ready, as you might say, to fold up.

• • •

Q. All right. Go ahead with your description. A. When I started, it was as a young fellow with that company, and I made friends, I made customers and developed efficiency to the point that we gradually realized that we were making money and made lots of money. We revamped the plant, and then became still wealthier and decided to build a new plant, and I was quite instrumental in picking out the particular site in Bay City on the water for this new plant, because I had a perspective in my own little minute mind as to further development of this particular company.

Q. What was the capacity of the two plants that you have in mind? A. The first plant had a capacity of around approximately 500,000 barrels. And then the addition of the Bay City plant augmented that capacity to approximately a million barrels of cement; maybe 1,200,000.

Q. Was the building of the Bay City plant financed out of earnings of the other plant? A. It was."[1]

Turning to the development of sales, Cree testified:

"A. Well, at the start, the sales were handled by me in the capacity of sales manager and salesman and everything, and I had one man that was working on a part time basis for me in the State of Michigan, working what we call the thumb of Michigan, the little country territory up north of the Saginaw and Port Huron.

Q. Outside of that, you did not have any salesmen? A. No. Then later on it was really necessary for me, with due respect to the wonderful following that I had created of friends and customers, because of the development of this company, it was really

[1] (C) Tr. 496-99.

necessary to augment our sales force a little, so I did put on another man, making us one and a half. Then finally, after the Bay City plant got developed, I put on another man.

• • •

Q. When was the Bay City plant developed? A. That would run about ten years ago, I believe.

Q. What was the largest number of salesmen you ever had? A. So the largest number at our full speed ahead was three men,—two and a half men,—one man giving part time to the operation.

Q. Was your sales force substantially smaller than that of the other cement companies in your locality? A. Well, I think without a question of doubt, there was not a company in the country that could match the small number of men that we had by anywhere near that.

Q. What was your cost of selling per barrel? A. Our cost of selling per barrel was low. I would approximate around 4 or 5 cents a barrel, which should probably show a selling cost of about 10 cents over what would be the average.

Q. Did you discuss selling costs with competitors and know what their selling costs were? A. No, I never had done that.'"[2]

As a further explanation of why Aetna's selling cost per barrel was low and the reason for a limited sales force, Cree testified:

"A. Well, not throwing any bouquets at myself, right now I have to do it to a certain extent, and I will say in answer to your question, the truth of the matter in that particular thing, and it is a bouquet to me, because of my personal ability in the development and the loyalty of the friends that I had established, plus the efficiency also that I had established in the method of distributing Aetna cement, which was a darn good cement.'"[3]

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[2] (C) Tr. 505-07.

[3] (C) Tr. 508.

Cree identified a map showing 10 shipping points of Aetna,[4] which Cree stated were at Detroit, Cleveland, Toledo, Port Huron, Bay City, Grand Haven, Menominee, Green Bay, Racine and Sault St. Marie. He was "a little bit hazy" as to the time when these shipping points other than Green Bay were established but he thought that they had been established beginning about 1930, with Detroit.[5] Cree shipped cement already packaged to these warehouses and sold his customers from the warehouses.[6]

F. R. Johnson testified that he was the President of Aetna and interested in a number of businesses including fire insurance and the business of the United Shoe Machinery Company with headquarters in Boston. He was the owner of about 10% of the capital stock of Aetna and the two other largest stockholders were estates. He came to Michigan about twice a year in order to check upon the affairs of the company, but otherwise he kept in touch by correspondence from Boston.[7] Some time prior to October 1933, criticism of the marketing methods of Aetna had been brought to his attention.[8] On October 3, 1933, at a time when the NIRA was in effect, Johnson wrote to Lingemann, General Manager of Aetna, the following letter:

[Italicized part quoted in Fdgs. Par. Ten (i)]

"Referring to the conference which Harold Cree and I attended on Friday last, at which there were also present, Mr. Stone of the Universal Atlas Cement Co., Mr. J. B. John of the Medusa Company, Mr. Rooney of the Huron Company, Mr. Lucas of the Petoskey Company, a representative from the Marquette Company, and later we called on Mr. Emil Stroh of the Wabash Company.

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[4] Com. Ex. 17.

[5] (C) Tr. 512.

[6] Com. Ex. 23 A-B.

[7] (C) Tr. 975-78.

[8] (C) Tr. 983.

It seems to me that the results of that conference should be a matter of record.

1. We admit that we had made a blunder when we quoted on the Government—Muskegon and Holland, Mich. jobs, March, 1933, and I promised that this will not happen again.

2. I did admit that while we quoted regularly on the Indiana letting in December, 1932, we did quote irregularly and different from the others in March, 1933, by using the Wyandotte base. The result of that bidding has been rather disastrous, as I see it.

3. It was stated that the other cement concerns could never find out definitely just what we were doing, when they called us by telephone, and that our answers were evasive. My answer to this was that we will tell them at all times how much a particular contract is for; and we are perfectly willing to tell them, if they inquire, at what price we took the order. Moreover, I stated that if we were in doubt or not clear what was going on or we sensed any trouble in the market, we would not hesitate to call up Mr. Rooney or Mr. Lucks, Mr. John or Mr. Jennings, or anyone else, and ask them about the situation, in order that we might know and not unintentionally tear down a situation. They stated that they would answer those questions promptly and freely, and we will do the same.

4. As to the Milwaukee situation and Pipkorn, that was discussed and we agreed that we should not allow a jobber to buy a large amount of cement, with an idea that he could use it later on to burst open the market; if he did, then in the future we should be careful as to how much cement we sold him, and try to control the situation. I appreciate that when a man buys merchandise and pays for it, it becomes his own and we cannot very well tell him what he shall do, but we must try to prevent a condition of this kind again.

5. We agreed that at any time, whenever we are going to enter a new territory, we would carefully survey and look over that territory, to find out what

procedure should be followed, what the customs were in that particular territory, in order that we might not knowingly tear down any price structure.

So in summing it all up, I pledged my word and the word of the Aetna Cement Company that we would play the game one hundred per cent—there would be no deviation from this in any way; we would be regular in quotations, fair in speech, in impressions and innuendos, which we would expect others to be. With that general understanding, all trouble caused by chiseling will be eliminated, and we shall go on in a harmonious way.

Now having given my word to the above, and Harold Cree who was there (representing Oscar Lingeman, who was unable to be present) joined me in this solemn promise, therefore it seems to me that this should be a matter of record, to be read over carefully and checked by:

Oscar J. Lingeman, General Manager
Albert E. O'Neal, Auditor
Harold S. Cree, Sales Manager
M. Smullen
Stanley Sherry

and I should like to have each one read this letter and after they have done so, put their initials opposite their name, so that I may know that each one has read it and is fully aware of what has been promised. I know that the loyalty of you all for the concern is great, and the loyalty to me is likewise unquestioned. This, coupled with your own desire for better things for the industry and the Aetna Company, will cause you all to hold to the text and run true to form; and this I do say in all seriousness.

I feel that the next two or three weeks are serious and crucial times with the entire cement industry.

After this letter has been checked over, I should like to have you return it to me for my file, keeping the copy (which is enclosed) for yourself.'"[9]

Cree was examined as to the nature of the complaints made by competitors about Aetna's conduct and referred

[9] Com. Ex. 20.

to in the numbered paragraphs in this letter, and he testified:

"Q. Can you explain what the blunder was with regard to the Muskegon-Holland, Michigan job in March, 1933, that Mr. Johnson referred to? A. Well, when we got those particular jobs over there, they were not very good big jobs, and the cement on that particular work would come from our Grand Haven warehouse, and these were bids to the government, and we were a few cents under. It is hard to recall all of those details, but I think that we allowed the government the testing, which amounted to 2 cents a barrel, or something. Or maybe it was the calculation of the so-called land grant rates, but we were under there a few cents and got that work.[10]

* * * *

Q. What was the substance of the discussion about the Indiana letting in March, 1933? A. Well, it dwelt upon the fact—the main fact in that thing was that we should not have carried this Wyandotte base to its equalization point, that we should have applied the Toledo base.

Q. Was not it the generally understood practice that the sum of the lowest base plus the freight would determine the price at destination? A. It evidently was not in that particular case.

Q. Well, I am asking you if that was the general practice of the industry? A. It really has not been prevalent around Michigan, because it seems that these Michigan bases had been confined to Michigan.

Q. Do you mean to say that the Wyandotte base was recognized as not going beyond the southern boundary of the State even though it would have made the lowest complete price outside the State? A. I do, because we came home with 150,000 barrels of pretty good cement.

Q. Do I understand that as soon as you got over the State line, that then a different base applied than the Wyandotte base? A. That is correct.

Q. What is this situation in Milwaukee and Pipkorn that is referred to here under No. 4 in Mr. John-

[10] (C) Tr. 571.

son's communication? A. Well, we sold—I went over to Milwaukee and met a very nice fellow there that was running—I believe the Needham Supply business in Milwaukee, Walter Meyers, and we seemed to get along all right, and it was not long before I received an order from him for a boatload of cement.

Q. A boatload? How many barrels is that? A. I don't know whether it was a complete boatload; I think it was. I think it was about 10,000 barrels of cement. I think it was an entire boatload. When he bought this boatload of cement, and he did pay for it, and very promtly, too——

Q. (Interposing) Well, what was the substance of the criticism about that transaction? A. Well, it would dwell on the fact that we should not have sold this.'"[11]

Johnson testified that the company at this time faced financial losses which he thought were attributable to poor merchandising and criticism of the company. He testified concerning this letter as follows:

"A. And I wrote to them in a pretty definite strong way, for the reason that I had been stared here right in the face with a loss in two months' time of about $400,000, and I was disturbed about it, and I had a feeling that there was some poor merchandising work being done by our people, and while I could not prove it at that time, while I did not get enough information to make a definite statement, I wrote this letter pretty clearly. I had heard that people, customers and competitors called up our office frequently—a great many times—and tried to get an answer yes or no, 'What do you know about this? We hear that you have sold goods in Indiana or some other place at such and such a price. Is it so? We do not want to meet such a price if it is only salesmen's gossip, but if it is a fact, we would like to know it.' They could not get an answer. It was an evasive answer.

[11] (C) Tr. 572-73.

Q. Who brought such a matter to your attention? A. Well, I think the man who—well, now, I cannot tell you.

Q. Was it only one person or more than one person? A. It was more than one person who spoke of that condition.

Q. Were those persons representative of your competitors? A. Yes, sir."[12]

Referring to the statement in the letter that the result of Aetna's bidding had been rather disastrous, Johnson continued:

"A. In any bidding done by anybody at any time which is lower than one's own base price, and we had our base price—we had our own market price, would bring trouble and disaster also.

Q. In other words you were of the opinion that you had to make the same price that everybody else did or face disaster? A. I figured this, that if we made a lower price to one man, we should have to do it to all of our customers all around, and if we did that to all of our customers, other people would have to follow and that would be disaster."[13]

Later, drawing Johnson's attention to his statement in the letter that the company would answer questions by competitors as to how much a particular contract is for and at what price the company took it, Johnson was asked if he considered it a proper business policy for competitors to acquaint each other "with the intimate details of each other's business". Johnson answered:

"A. I consider it perfectly proper for any one manufacturer to call up a brother manufacturer, or he may be a competitor, probably, and say, 'Did you sell this or that in this particular market at a particular price? We have heard that you did. Now if that is true we would like to know it, and if it is

[12] (C) Tr. 983-84.

[13] (C) Tr. 985.

not we would like to know it, because then, of course, if it is sold at a lower figure we will have to meet it. If you did not then it is a salesmen's loose talk and I shall pay no attention to it.'"[14]

Cree wrote to Johnson on February 1, 1935 submitting his sympathies upon the death of Mr. Paine, the company's Treasurer, and then went on to discuss business affairs.[15] To this Johnson replied on February 4, 1935 disclosing the familiar difficulties of business management conducted at a distance from the field of operation:

"You do not need to worry about bothering me with business—I am anxious to know all. I have read your letter of February 1 carefully. I note what you say about Huron and about Crapo, about Rooney, and all. I am with you one hundred per cent; and the letter that you wrote to Mr. Johns is quite correct.

When things get to a point that I can't back you up in your work for me, then you and I will part company. Until that time, we are one; and I know well that anything unusual or extraordinary—either for or against the Aetna Portland Cement Company and its policies—will be brought to my attention by you (as well as by the others) immediately; and other people need not think I am not in possession of information and facts. I know well that if you make an error in judgment or a mistake, you will come frankly forward and say so.

I compliment you when you do good work; I criticize you when I think that criticism is justified; but I am pleased that you wrote the letter that you did to Johns.

You may rest assured that I will watch my step, and I will not get drawn into a whirlpool of arguments against you and Oscar and Albert, when you are not around."[16]

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[14] (C) Tr. 1053.

[15] Com. Ex. 24 A-C.

[16] Com. Ex. 25 A-B.

On May 20, 1935, Cree addressed a three and a half page letter to Lingemann, General Manager of Aetna, explaining a number of transactions of which there had evidently been complaints. Cree testified that he prepared the letter in response to one addressed by Johnson to Lingemann.[17]

The letter referred to a sale of 1500 barrels to the City of Grand Rapids, which represented one-tenth of the annual requirements of the City, and a similar sale to the City of Kalamazoo of a part of its annual requirements of 50,000 barrels. The transactions were criticized for sales on an annual requirement basis,[18] whereas under the Code, requirement sales were limited to quarterly periods.[19]

The letter also refers to a quotation to the Government referred to as the Algoma quotation, in which Cree acknowledged that he had made an error in calculation and in so doing had violated the price provisions of the NRA Code.[20]

A further incident was a sale made by the Soo Sand and Gravel Company, dealers at Sioux City. This Company was warehousing Aetna cement and acting as a distributor for the Company, and, to the best of Cree's recollection, they received an inquiry from "the Lighthouse Department" of the United States Government for a "small carload". The Soo Sand and Gravel Company issued a quotation, signing Aetna's name or their own, and Petoskey complained to the Cement Institute on the ground that Aetna was allowing its distributor to quote to the Government on the type of work which should have been quoted only by a manufacturer.[21]

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[17] (C) Tr. 646; Com. Ex. 28.

[18] Cree, *supra*, Tr. 647-51.

[19] Com. Ex. 557: Article 11—Method of Selling and Marketing Cement.

[20] (C) Tr. 653, *supra*, p. 2178.

[21] (C) Tr. 661-62.

The letter also contained a reference to distribution of Aetna cement in Cleveland through a distributor. Cree testified that this was a subject of complaint by two or three companies of whom he named Medusa and Standard.[22]

On June 28, 1935, Cree wrote to Oscar Rohwer, Sales Manager of Universal Atlas at their Chicago office, referring to a telephone conversation of the previous day regarding the shipment by Aetna of a boatload of cement to Racine. Cree stated that he was criticized for not announcing to the trade the arrival of the shipment, and Cree testified, "I told him we did not worry about those things."[23]

In concluding his letter to Rohwer, Cree wrote:

> "I wish to personally thank you Oscar, for calling the above subject to my attention, as of course, those distributing points of ours over there were originated by me as a proper development for the Aetna Company, and I think it is entirely sound. However, soundness of course, is based upon an ethical condition, as I know it is not your desire at any time to tell us how to run our business, as I do know that you do know that it is our sincere endeavor at all times, to see AETNA cements distributed on a plane as high or higher than the average; and therefore, would not sacrifice our pride in distribution unbecoming."[24]

Under date of August 29, 1935, Cree prepared a memorandum not addressed to anyone on the subject of "bad business" in which he itemized various matters relating to dealer sales at Kalamazoo and Cleveland, and in Indiana. Questioned as to the purpose of this memorandum, Cree answered:

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[22] (C) Tr. 660-61.

[23] (C) Tr. 672.

[24] Com. Ex. 31.

"Well, my reason for getting this thing out was to allow me to keep acclimated as to the current conditions in the immediate past so that if there had been any criticism that would come, I would have a record of what had transpired."[25]

Cree identified an unsigned memorandum dated November 21, 1935 as given to him by Lingemann[26] and received by Lingemann from Johnson.[27] It criticized price conditions in Michigan and Aetna's sales to WPA. Cree's impatience with criticism of Aetna's sales and the duty of giving explanation of what was going on to Johnson, was revealed by the nature of his comments on this memorandum when on the stand. He testified:

"Q. What was your purpose at the time in making pencil notations on that memorandum of November 21st? A. Well, just as I have always done. I tried to analyze these things, and I have to get these darned memorandums that you have been showing here, up."[28]

When the Examiner asked him whether this memorandum went to any others in the trade he said:

"No, I could not say. I believe that I stated before, but I will try to more clearly state to you, that this was a memorandum that came through from Mr. Johnson, according to that previous wire and letter to Mr. Lingeman, who in turn gave it to me for my analysis, as he has done everything, and accumulated with the rest of this crap that you are looking at."[29]

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[25] (C) Tr. 675; Com. Ex. 32.

[26] (C) Tr. 725; Com. Ex. 42.

[27] (C) Tr. 727.

[28] Id.

[29] (C) Tr. 734.

Cree identified a further memorandum of his, dated May 1, 1936, entitled "In Answer to Mr. Johnson's Letter" and which covered 4 pages in response to inquiries that had been made by Johnson as to the state of business and the methods being pursued by Aetna's sales manager.[30]

MEETING OF DECEMBER 6, 1935

On the stand, Johnson identified two typewritten pages dated December 6, 1935 as a memorandum which he had read at a meeting in Chicago attended by Lingemann, Cree and himself, and Calvin of Consolidated, John of Medusa, Lucas of Petoskey, Rooney of Huron, Mooney of Wolverine, Conkrite of Universal Atlas, Jennings of Wabash, Colburn of Marquette, and Russell and Luck of Peerless.[31] This memorandum is as follows:

"POLICIES OF THE

AETNA PORTLAND CEMENT COMPANY

PRODUCTION

We shall run our mills full time or half time or shut them partly down, in accordance with our judgment, as our needs and our customers' needs for cement demand.

We realize that there is danger in over-production, and at this particular time we are running our Fenton plant practically none at all—only a very few months in the year—and at the present time it is closed.

Our Bay City plant we are running with a reduction of one kiln, and we shall continue to increase or decrease our production as our best judgment dictates.

We do not intend to tear down or destroy the industry in which we are identified. It is our desire to build up and strengthen.

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[30] Com. Ex. 47.

[31] (C) Tr. 1005-06; Com. Ex. 45-A.

We intend, when entering a new field where we have not sold before, not to disturb in any way the then present price conditions or the general conditions of that locality that have been established by the industry prior to our entering.

We do not intend to maintain our boats as a means of transportation for our cement and any other materials, to any places that we may wish to go.

WAREHOUSES

Wherever we have a warehouse, we intend to sell our own goods by our own men, and do our own billing.

Whether or not these warehouses are profitable, is a matter which we must carefully watch.

We have one distributor only, and that is the Limestone Products Company. We have a contract with these people which will run for some time yet, and which we will honor.

We will not add any more distributors without first the approval of the General Manager and the President.

We do sell to dealers. They buy our cement and pay for it promptly, and it then becomes their property. It will, however, be our desire to have them maintain prices and conditions in the various localities where they operate, and confine themselves to the districts in which they are entitled to operate.

It is our intention to sell cement in any field which we may desire to go into, but in doing so, again we will maintain the general market price and trade conditions and practices that are in vogue in that locality (wherever we may enter), when other brands of cement are being sold there. Again, it is our intention not to tear down but to be constructive and build up.

A copy of our letter dated August 15, 1934, to the Indiana Builders Supply Company should demonstrate what we propose to do; and this same policy shall be adhered to in entering any new locality.

In quoting on cement, we desire and wish to adhere to the general market price; which is now even too low. By so doing, we well realize that we may

now and then lose an order, but we would rather lose an order once in a while than to pull down the whole price structure, although we cannot sit idly by and let it all go that way, as we do not intend to lose our good customers, and we necessarily must have a reasonable production, and we can ask for no more than a reasonable production and sales at this time.

We have agreed that in shipping cement into the Upper Peninsula, it shall go in carload lots, and no truck deliveries will be made.

See our filing, dated Nov. 5, 1935.

These should be definite rules, which the General Manager will see are adhered to. Any change in thees rules should be approved by the General Manager and the President."[32]

Johnson gave as his reason for reading this statement:

"A. My reason for doing that was that in my opinion, to my knowledge, we had been losing this $700,000, which is a lot of money. My feeling towards my people got to a point where I felt uncertain as to what they were going to do, and I felt that it was incumbent upon me to denote to the trade generally, as well as to my people, what our policies were, not what they were going to be but what they were at that time."[33]

His attention was drawn to his statement that it was the company's intention to sell cement in any field where it desired and in doing so that it would maintain the general market price and he was asked whether he considered that that statement did not have any application to the future. He testified:

"A. Its only application to the future was that we were not going to lower our general market price and we were going to hold it. Just because the field

[32] Com. Ex. 44 A-B.

[33] (C) Tr. 1006-07.

was up then and they thought they would need a lot of tonnage they got worried over this great question of tonnage, tonnage, tonnage and tonnage. It was the thing which we were going to go on and follow our own established price.

Q. As a matter of fact your tonnage was disproportionate to the capacity of your plant compared with the tonnage of other people, other competitors, was it not? A. Well, I do not know as I am going to discuss that, sir, but I know they were talking about tonnage all the time.

Q. Who? A. Cree and Lingeman.

Q. Did not your competitors ever talk about tonnage? A. Not to me.

Q. They never objected to the tonnage you were getting? A. I have never had an objection."[34]

Lucas, Vice President of Petoskey, testified that he attended this meeting and heard Mr. Johnson read his announcement. His testimony continued:

"Q. And after he made the announcement, did you discuss or agree on that policy with Mr. Johnson? A. No.

Q. Did you know why he asked you to attend that meeting? A. No, I did not.

Q. Would you tell us whether, to your knowledge, any agreement was reached by anyone at that meeting? A. No.

Q. Do you recall under what circumstances you happened to be there? A. No. I am quite sure I was not invited by Mr. Johnson, but somebody invited me into this meeting. I don't remember the circumstances other than that.

• • •

Q. Were you ever asked to enter a meeting where Mr. Johnson made a similar announcement of policy? A. No, in fact, the whole procedure was very unusual, as far as I was concerned. He appeared to be taking some of his own personnel to task, and sort of serving notice on them that he was assuming

[34] (C) Tr. 1006-07.

some active direction in the management of the concern, himself. It seemed very unusual to me."[35]

In regard to this meeting, Colburn, Vice President of Marquette, in his stipulated testimony said:

> "With relation to the so-called meeting in December, 1935, where Mr. Johnson, formerly President of Aetna Portland Cement Company, is described as reading aloud a statement of Aetna's policies, the said Colburn recalls that the Witness Johnson came to the office of Marquette, during December, 1935, in a period when there was a meeting of the Portland Cement Association going on in Chicago and at that time invited Colburn to call upon him at his hotel where he said he was going to have a small group of people get together for a little social gathering in his room, and in response to this invitation D. S. Colburn did call at Mr. Johnson's room, where he saw a number of other people, remembering only by name the witnesses Johnson, Cree, and Mr. Lingeman, but recalling that others were known to him and were in the cement business but not remembering their names; he did not on this occasion hear the Witness Johnson read any statement of policy, but at the time when he came in the Witness Johnson was haranguing Mr. Cree and Mr. Lingeman about Aetna's unprofitable investments in warehouses which Lingeman and Cree were said to have established; and he, Colburn, was not interested, considered this matter none of his business, stayed only a few minutes and left." (Tr. 39041-42)

Russell, Vice President of Peerless, speaking of this meeting, testified that while attending a P.C.A. meeting in Chicago, Johnson invited him into a room in the Blackstone Hotel where there were several others, including Johnson, Cree and Lingemann. Russell's testimony continued:

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[35] (R) Tr. 38781-82.

"And, at that time, Mr. Johnson read a letter that he had prepared, setting forth certain instructions to Mr. Cree and Mr. Lingemann, and I never was clear in my own mind why he should invite myself and other members of cement groups in, except that he was giving instructions to his own men, apparently, for the purpose of impressing on those employees the necessity of following instructions.

Q. Did you discuss with Mr. Johnson, this letter which he read? A. I did not.

Q. Was there any agreement entered into at that meeting? A. No. There was not, to my knowledge. Certainly not on my part.'"[36]

On December 13 Johnson, having returned to Boston, wrote to Lingemann concerning this meeting of December 6 and the measures which he wanted taken, as follows:

"I arrived here safely, this morning, at 11:30. It is now quarter of twelve, and I am dictating a few things which are still fresh in my mind, and while they are fresh, I wish to get them on record, for you to follow out definitely, completely and as promptly as possible.

[Italicized part quoted in Fdgs. Par. Ten (i)]

I now refer you to our policies, as dated December 6, which were read at the meeting the other day; and for your information I will say that there were present at that meeting the following men:

Mr. Ben Calvin and Mr. William Storey, of the Consolidated Cement Co., Jackson, Mich.
Mr. J. B. John and Mr. Harry Lucas, of the Meduza and Petoskey Cement Companies
Mr. Burt Rooney of the Huron Cement Co.
Mr. Frank Mooney, Sales Manager of the Wolverine Cement Company
Mr. Archie Conkrite (who came in later), of the Universal Atlas
Mr. Jennings of the Wabash (who likewise came in afterwards)

[36] (R) Tr. 34402-03.

Mr. D. C. Colburn, Vice Pres. of the Marquette Co.

Mr. William Russell and Mr. Luck of the Peerless

Mr. F. R. Johnson, Mr. Oscar Lingemann, and Mr. Harold Cree, of the Aetna Company.

You will remember that at that meeting all things were discussed clearly.

I call your attention to the second page—first paragraph—as it was read at that meeting. Now in that first paragraph, we speak about selling to dealers. It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except into his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him.

Now this is a matter of much importance, and I want you and your organization to start at once to see these people, whether it is McCall or who; and no better work can be done than to have Smullens, Sherry, Harold, and yourself if necessary, call on these people and explain the matter clearly to them, so that promised we will do, and we will; and it is up to you, Oscar, to see that it is done; and then when it is done, report to me, but this should not be allowed to drag, and Harold can report to you, as that is his line of operation, and I know he will.

The second thing to be taken up is this question of warehouse situation;

Now then, in looking at my memorandums, I am referring to the letter which you wrote to me, dated Dec. 5, in which you gave me the names of the different warehouses, and I also refer to the memorandum prepared by Albert O'Neal, dated Nov. 1, giving me certain detailed information.

As to these warehouses, there is no use of discussing Menominee, Green Bay or Racine, because those are all under Mr. Smith's jurisdiction, and we are going ahead with him, and that settles it; but

Harold should get in touch with Mr. Smith (or you should) and ask him to co-operate with us just one hundred per cent, and not to do anything in any way that would look as though he were giving any advantage to any buyer of cement, either in the way of commissions or an added amount of other materials. I can't believe Mr. Smith would do that. I enjoyed meeting him—I think he is very shrewd, very keen, very smart—and he is likewise, in my opinion, very honorable.

[Italicize part quoted in Fdgs. Par. Ten (i)]

Other concerns who have had a distributor (as Mr. Smith) have not had good results—perhaps that is because they did not have a good man; so please ask Mr. Smith to assist us in every way, so that we can build up higher prices in the market there, and in Michigan generally, because we have given our word that we will not tear down any price structure—we will build it up—and we don't care if we do lose an order now and then; but we do want to sell every barrel of cement that we can, at the full price, and no advantages to be given to the purchaser in any way—trucking or anything else; not that I think he is doing it, but I do want to have him be careful, and be careful with his men.

You know, we in our organization have made mistakes when we should not, and shame on us.

Therefore, those three places are taken care of.

CLEVELAND

See J. B. John about this. Have that O.K.'d, and as soon as it is arranged, write me, and ask Mr. John to write me.

PORT HURON

See Mr. Russell, and get that straightened out; and when it is, and it is O.K. for both of you, write me and have Russell write me.

As you see, I have started on this thing and I am going to go through with it.

DETROIT IS O.K.

SAULT ST. MARIE

Withdraw from there.

GRAND HAVEN AND TOLEDO

See what you can do in both places that will be satisfactory. It may be wise to withdraw from both places.

These are the matters which are most important at the moment. There are some other things which I shall take up with you later on.

WAREHOUSES AND DISTRIBUTORS

Please do not have any more warehouses without first consulting with me; I prefer no more—we are likely to spread out too thin.

As to distributors, have no more of them, unless we all get together and decide it is for the best interests.

COST OF DOING BUSINESS FROM WAREHOUSES

There was so much discussion on this point that I made it my personal business to inquire of all the presidents that I could get hold of (and men who knew the details of their business) regarding storage warehouses and what had been their experiences. I talked with such men as Mr. Charles Hogan, President of the International Cement Co., and Archie Conkrite and Mr. Stone, Vice Presidents of the Universal Atlas, Mr. Joe Young, President of the Lehigh Portland Cement Co., and Mr. Ben Calvin of the Consolidated, and many others; and universally they all said that they had found by years of experience that it cost them too much money to establish and continue warehousing and do business from those various points. Especially definite in that statement was Mr. Charles Hogan, who does not operate in Michigan or in our locality (and neither does Mr. Joe Young of the Lehigh); and both of them said that they felt we would find it just as they had found out, that it cost too much money to do it. Therefore, we must analyze this situation some time

between now and Spring, so as to know 'where we are at.'

I must say, with the earnestness of the answers that I received from these gentlemen, and with such figures as we have, I am not sure that we are on the right track.

I shall expect that you will take up this work immediately; it must not drag. It seems to me that you and Harold should do this work—it is not for me to do it; it is part of your general, every-day business affairs.

It is going to be essentially necessary to live in accordance with these policies that I have established, which you two have already approved of; and you know that I gave these gentlemen my word that we would live up to them.

[Italicized part quoted in Fdgs. Par. Ten (i)]

I shall hope and expect that you will get right to work at this immediately. I believe it is the intention of you and Harold to work in accordance with my plans as laid down; in fact, I might say it is very decidedly essential for your future value to this organization to do so, and I don't believe you will disappoint me.'"[37]

Commission's counsel read this exhibit into the transcript and Cree made explanation of his pencilled notes on the exhibit.[38]

Aetna's Losses

On cross-examination Cree was asked whether he remembered that the company's loss for the fiscal year 1932 was $263,519.33 to which Cree replied:

"A. Well, if you say it is it will have to stand that way. I do not know, because I never had contact with the books, nor the trial balances, or anything.

[37] Com. Ex. 45 A-D.

[38] (C) Tr. 750-62.

You might think that is strange, but that is the truth. Maybe I was just a little bit dumb."[39]

Cree also stated that the same answer would apply to the question as to his recollection of a loss of $137,525.30 for 1933, $88,800 for 1934, $107,697.71 for 1935 and $122,051.73 for 1936.[40] On redirect examination Cree was asked whether he knew that other cement companies were showing losses during the same period. Cree answered:

"A. Well, that particular period was through what you call the depression period and I presume that every company—most every company—lost some money, and I do know if we had not in that particular period—I have records at home or I ought to have them, because I always maintained an office at home and worked nights and days and holidays—I have records home, in the State of Michigan for one year—for three years, and it may be in that period, that I sold a lot of cement there in competition, and it was on maybe two or three hundred thousand barrels of cement a year, and I did it on very competitive bidding—I don't think my average lower price in getting those jobs would run over 3 cents a barrel on it all. It was a wonderful record, and how I had a horseshoe on my neck to figure out those things, I don't know, but we got the business, and at that time it was figured up that if we had not gotten that business, which you might say was highly competitive, the Aetna Company would have lost so much more money, and the other thing was that if the Aetna Company had decided not to take any business in the trade or anything and locked the door and threw the key away, why, they are out of business, so when you think about losses that you speak of there, that I must say in justification of my sales, that they were very competitive and the average was always comparative with Mr. Crapo and his activity."[41]

[39] (C) Tr. 938-39.

[40] (C) Tr. 939-40.

[41] (C) Tr. 944-45.

Examined on the relation of prices to cost Cree testified:

"Q. You claimed, as I understand, that your costs were lower than those of your competitors? A. Did I claim that?

Q. Your sales cost particularly. A. Oh, the sales cost.

Q. Yes. A. Well, I imagine without a doubt they were; much lower.

Q. You gave the figures on both so that a comparison might be made and stated the source of your figures. Did you consider your lower selling costs in determining how much mill net you would be satisfied with? A. Well, that went into the picture, yes, to a certain extent, with the general cost of cement.

Q. As I understand it, while it was not your general practice to quote less than the delivered prices quoted by others, did you find it sometimes good business to sell at less than those prices? A. Well, sometimes we seemed to think—we might have been wrong—but we seemed to think that it was good business to make a particular applied price for some particular tonnage and we found now and then other competing prices fluctuating too, at times.

Q. Did the size of the order have anything to do with your position as to whether it was good business or not to cut the regular price? A. Oh, I would say yes. I think it would always have that bearing to a certain extent, the tonnage involved.

Q. Mr. Leisure asked you something about price wars and whether they were not unprofitable. However, the fact remains, does it not, that such price wars have existed? A. Have existed?

Q. Yes. A. Yes, I would say the State of Michigan has been highly competitive ever since I have been associated down there.

Q. Were you one of the leaders, so to speak, in making it competitive? A. Well, I could not say that, no. I will say again that I always had a lot of pride for the quality of our particular cement and the quality of the service that we had instigated around in these different warehouses, boat and truck transportation, and we had something to offer. I thought it was sound and on an economic basis that would

create a lower cost of the operation to the particular consumer, and I could not see any reason why I should go around and ring doorbells to try and give any further money away if I could find out what the other fellow was doing, but his quotations or his activities; why, it was all right to have an altruistic spirit, but I had to think of the Aetna Company, you know, and I tried my best to get the best price possible at all times.

Q. And after you found out the other fellow's price, did you sometimes go below it?

* * *

The Witness: Sometimes I no doubt did to get the business.

By Mr. Wooden:

Q. Do you mean by going below the price of competitors? A. By going below. I would not know that I was going to be below, but I would figure probably that that price would be the price that might be below some comparative figure. Whether that is a circular figure or whether it is a figure that I found out from somebody that was below the circular figure.

Q. Did you have a certain minimum mill net below which you would not go? A. Well, I will tell you again, my dear sir, that I always adhered to the rule that our selling price was based at all times on our own cost with respect to competition at all times.

Q. You have not answered my question. Did you have a minimum mill net below which you would not go in taking business? A. Not any definite mill net; in other words, our own established basing point—that is what you meant, isn't it? No, we never had anything like that. We just had a respect to our own cost and the competition.

Q. Did you keep in mind the relation between your costs and your mill net in making quotations? A. Always.

Q. On each particular job? A. Generally speaking, yes.

Q. The criterion of whether you could afford to take a given job at a given price, I assume, was to compare your mill net on that job with your cost? A. Well, that would have a bearing on it, of course.

Q. Do you make any distinction between price wars and price competition? A. Well, they are almost the same. It is a battle any way you look at it."[42]

Describing his pricing methods to contractors, Cree testified:

"Q. Mr. Cree, when you speak of allowances to contractors that you sometimes made, in what form were those made? A. Well, we have made allowances to contractors on particular work.

Q. Did you sell them at one price and then make a later deduction from the price or was your allowance included in the price that you first made? A. We have at some times made allowances under the original price; an extra discount, in other words, you might term it.

Q. And at other times what? A. At other times what?

Q. Yes, at other times what did you do? A. Well, it would be termed an extra discount. We have done that.

Q. Were those allowances at times secret? A. Well, what do you mean by 'secret'? We were aware of them.

Q. I mean were they made without the knowledge of your competitors? A. Well, I would think that our business was run without the knowledge of our competitors. If I could have it that way it was done.

Q. Did you ever have any criticism or objection offered by your competitors to your making these allowances, or any kind of allowances to contractors? A. I can not remember any specific incident, no."[43]

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[42] (C) Tr. 950-54.

[43] (C) Tr. 970-71.

In July 1936 Johnson went to Michigan and demanded the resignations of Lingemann and Cree. Lingemann accepted and resigned. Cree refused to and was dismissed. Concerning the circumstances surrounding his dismissal, Cree testified:

> "A. Well, I was in my office, and he came in and I think it was about two o'clock in the afternoon, and he called me in this office that he was occupying and told me that for the better interests of the company, that he wanted me to sign that paper of resignation, which I did not sign. He further stated on my reluctance in thinking about signing that or not signing it rather, if I would sign it he would give me the three months' salary, and if I did not sign it he would give me only one month's salary. That is all that was said.
>
> • • •
>
> Q. Did Mr. Johnson give you any details as to why he was asking for your resignation? A. I tried to do that. I mentioned the point, I said, 'My God, I have been with this company for 26 years, and I certainly won't resign, and what is the reason for this'? He would not give me any reason, only a general reason that it was for the better interests of the company, although I do remember that he flashed a letter at me quickly, and I saw the letter going by and the letter was from Mr. Crapo to Mr. Johnson, criticizing me for my activity in Indiana, recent activity in Indiana. And the letter referred to the Farm Bureau or to some particular order or detail at that time that I don't know.
>
> Mr. Wooden: I would like to ask counsel for the respondents the Huron Company and the Aetna Company to produce the letter that has been referred to.
>
> Mr. Leisure: May I ask a question on the voir dire? When you say he flashed a letter at you, did he show you the letter?
>
> The Witness: Well, like this (indicating), just like that (indicating).

Mr. Leisure: So from that flash you determined that the letter was criticizing you and who it was from?

The Witness: Yes.

Mr. Leisure: That is all."[44]

Cree testified that after his discharge he endeavored to get employment in the cement industry but without success.[45] Asked if he was advised as to why he would not be employed he said that he was.[46] Asked for reasons stated to him, he referred to three conversations with Baker, an officer of the Peerless Company. He testified:

"A. Well, those conversations took over a period of perhaps a couple of months, and I was rather waiting with anxiety thinking that perhaps I could get located with them, because I could do them a world of good. Finally, the thing was consummated in the expression from Mr. Baker that he did not think that it would be quite proper for me to go with them because I might take the Aetna Company's customers, or I might get their business, and so that remark brought from me that I thought it was their business to hold their business, and I told them I did not think that was quite the proper American spirit. That is the truth, and you asked me and I told you.

Q. What did he say to that? A. He, as a very fine gentleman, said 'I guess you are right, Harold.' So I went away, and that was the last of that."[47]

As to the specific circumstances attending upon the resignation of Lingemann and Cree's discharge, Johnson, referring first to Lingemann, at a time when Lingemann was in Boston in June 1936, testified:

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[44] (C) Tr. 532-33.

[45] (C) Tr. 815-16.

[46] (C) Tr. 817.

[47] (C) Tr. 818-19.

"A. * * * And he was taken ill. His wife telephoned to me for a doctor, and I sent my doctor and said, 'This man has got a nose bleed, stop it and look him over from head to foot; I want to know something about him.' Because I had had my misgivings for a long time as to the health of this gentleman. He kept telling me that he was being checked up by a doctor, and he was all right and he was OK, but my doctor checked him up, stopped his nose bleed, and the next day he said to me, 'Mr. Johnson, if this man holds any important position in your organization you should get another one right away.' I said, 'Why'? He said, 'At the time that I made this examination, which was yesterday, he had a temperature, a slight temperature, he had a blood pressure of 230, he has hardening of the arteries and enlargement of the liver, and some kidney trouble. He is in a serious condition, and that man is no more fit to carry on business, if you try to drive him to business, tell him he should come back, he is likely to die almost any moment.'

Q. What did you decide to do, at that time if anything? A. Well, first I got him home as soon as I could, and then I thought over as to what to do, and my doctor had told me that that man will never again be ready and equal for hard work; he cannot do it; his nervous condition is such, and he has got these complications, and he cannot go on. I then commenced to think around to find out what I should do. I had two men in mind; one was Mr. Calvin and another man. I talked with my associates and told them the story and I said, 'We have got to get another general manager. Just what we will do with Mr. Lingemann, how we will arrange with him is a matter for future consideration, but we must get another general manager.'

Q. Did Mr. Cree's name come into those discussions with your business associates? A. As the general manager? No, sir.

Q. Did his name come into the discussion in any way? A. Yes. After I had spoken of Mr. Calvin, I said that I have lost all confidence in Cree, I do not believe he is temperamentally fitted to be a good

business man, and I think from the results that I see, we have got to make a change there.

Q. What had caused you to lose your confidence? What was his relationship with the other men in his office at that time? A. The whole office was jealous one of the other. He was of a jealous disposition.

Q. When you say, that Mr. Cree was jealous, what did you mean by that? A. Well, I think he wanted Lingemann's job as general manager, and he was jealous of Lingemann.

Q. You say you lost confidence. What if anything had you observed as to Mr. Cree's regular attendance at his office in the last two years? A. His regular attendance was very irregular. There were times when he was not there at all during certain days.

Q. What had you observed as to large telephone bills from his home? A. The bills—his telephone bills were very large indeed, and I was stared with this expense and I was looking to cut down all expenses, and that telephone bill of his was extremely large, very large. He told me that he had arranged with his entire trade so that in that way he could do a great deal more work and not have men, they could call him up on long distance and reverse the charge.

Q. And doing business at his home? A. Doing business at his home.

Q. What did you do, just go ahead and tell his Honor what you did after you had these talks in Boston? What if anything did you do with regard to this situation that had been called to your attention? A. I went to Detroit. I called on a doctor who had also examined Mr. Lingemann, and he gave me also word for word the same diagnosis of the case as the man or the doctor did in Boston. He told me, he said, 'Mr. Lingemann cannot work. He is just simply all used up for some reason or another.' He said, 'He seems to be frightfully nervous.' Well, I said, 'He has had several vacations, three months and two months at a time, and so forth. I cannot understand it.' He said, 'Well, he is in bad shape, and he can never do another week's hard work or even a day.' I said, 'Well, I wanted your report,

because I am going out to see Mr. Lingemann—I am going to see Mr. Lingemann and I am going to talk over all of these matters with the probability of his resigning.' I said, 'I am going to have him into the office.' He said, 'Don't do that.' He said, 'That thing might strike him and he might die like that.' (Snapping fingers.) 'Go to his house.'

I did. I talked it over with Mr. Lingemann. At first it was rather a shock to him. He realized it and he felt that perhaps that was the thing to do. He said to me, 'I will sign anything that you ask me to, because I know that we have been together for many years and you have always been very good to me.' 'Well,' I said, 'Here is a resignation as general manager and vice president.'

Q. Was there any discussion at that time about his possible improvement in health and about his coming back to work? A. Yes, he said, 'I am signing this—I cannot carry on at the present time and I am in hopes that perhaps some time later I may be able to come back and be of some help to the Aetna Company.'

Q. Now, will you tell his Honor what your attitude was at that time and what you did with respect to Mr. Cree? A. Either that same day or a day or two after—I don't know—I had Mr. Cree in my office. He came in and I told him I wanted to see him, and then I told Mr. Cree that for the best interests of the company, I felt it was necessary to dispense with his services.

Now, my reasons for that, sir, is the fact that he had given—the fact was that I had before me a loss of $700,000 in business, dollars and cents. He alone claimed to be the one man responsible for the merchandising of the product, and as such then he was responsible for this situation, because he had given these rebates, and those rebates were not known until the payments were made, when they were taken off from the bills as per agreement with Mr. Cree, and he had carried on this warehousing proposition where I had been very skeptical as to its good working and profit, that it was a profitable thing to do. And by these promises he would give—he did give

anywhere from 10 to 30 cents a barrel to the people for handling the cement going through their place. That cement that those people, and in some cases they did, they could go and cut that price of our regular price of cement to one person or another, and eventually it came back on us and there was trouble, and then it became known that our price was lower, and it meant a further loss to us, because we were looking for profits. Any fool can give away business, but to sell it at a higher price, that is different.

Q. A moment ago when you said you discussed the problem of acquiring a new manager with your associates, did you mean your own business associates or did you mean competitors? A. No, sir, I did not mean competitors at all. I never talked with a competitor about it.

Q. Now, Mr. Wooden asked you in one of his last questions to describe what practices Mr. Cree had indulged in which you considered were against the ethics of the profession. Did you consider his practice which you have just described of giving secret rebates by warehouses and using those warehouses really as salesmen, did you consider that as ethical practice? A. No, sir.

Q. You mentioned the jealousy existing. Will you tell his Honor what your attitude of mind was about putting in a new manager with that situation existing? A. Well, of course, everybody knows that not a single soul in this room would want to take the managership of a concern and have in there some material that was going to be disturbing and jealous.

Q. You felt that would not be the thing for you to do? A. We could not afford to put that on any manager, whoever we selected there, because I was not going to hang that sort of stuff around a man's neck.

Q. To make it entirely clear to his Honor, was this just letting one man go, or did you have a complete shake-up and change your organization? A. We changed the whole organization."[48]

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[48] (C) Tr. 1063-69.

Asked in what specific way Cree's policies did not conform with the ethics of the industry, Johnson testified:

"A. I am not going to talk about the ethics of the industry, sir. Mr. Cree's policy did not follow in line with my idea of good merchandising. When we lay down a price to do merchandising in the Aetna Company, we should adhere to that one price to all of our customers, and not give a rebate to this one or a lower price to the other one in a secret way, because eventually when you do that, your whole house falls down and you have got to give it to everybody. Then when you give it to everybody, your competitors are going to say, 'Well, there is a lower price,' and they come on and meet it, and then, as I have said before, that pricing system of Mr. Cree's was the most chaotic thing that you ever saw.

Q. I suppose you would say it was no system at all? That it was chaotic? A. I certainly would.

Q. Weren't you aware of what the general policy of your subordinates was during those years? A. I was anxious. I had felt that he was not following out my instructions. I felt that Lingemann could not control him; he would run out on his own hook. He would do as he liked, and then later on we would know something about what he did.

Q. You would hear about it from competitors? A. What is that?

Q. You would hear about it from competitors? A. Yes, and we heard about it ourselves in our own way, and when I would ask him a question, he was very evasive.

Q. Can you specify any particular instance? A. What? When he was evasive?

Q. Yes. A. Well, if I did, sir, it would fill a very large book.

Q. Can you give any specific instance? A. No, I cannot, only in a general way. I did not keep those sort of things. In a general way his answers were very evasive.

Q. As a matter of fact, didn't he write you in detail about these various things? A. Once or twice he did write me in detail.

Q. Oh, quite so often, wasn't it? A. Well, accept it as that. At times he would write clearly, and other times he was off in a fog.

Q. You found your competitors rather critical of him, anyway? A. Sir?

Q. You found your competitors rather critical of him? A. I did not ask my competitors, as a rule.

Q. You did not have to ask them, did you? They told you? A. (Continuing) About this or that.

Q. They told you without being asked, didn't they? A. Sometimes they said to me, 'We cannot understand why Aetna quotes such and such a price,' and I said, 'Well, they quote their regular price,' and they said, 'No, they have quoted less.'

Q. Did any of them ever express to you that they wondered why you kept a man like that? A. No, sir. They probably thought it: They probably thought I was crazy.

Q. You got the idea that they thought so? A. Well, I would have thought so if I had been them."[49]

Johnson testified that losses of over $107,697 in 1935 and over $122,051 in 1936 changed to a profit of $40,000 in 1937 following the change in management.[50] Again pressed as to why Johnson lost confidence in a management who previously had built up a surplus of nearly $2,000,000 in the earlier history of the company, Johnson testified:

"A. * * * He lost my confidence because he could not carry out the instructions which I had asked to have done.

Q. Do you mean the instructions which you gave him regarding the relationships with his competitors? A. No, sir. I gave him instructions and gave Mr. Lingemann instructions to be passed on to Mr. Cree that when we had a definite selling price and a policy, that we should adhere to that, and not to go playing fast with one and loose with the other.

Q. But you did give him instructions about his relationships with competitors? A. Sir?

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[49] (C) Tr. 1060-62.

[50] (C) Tr. 1074.

Q. You did give him instructions about his relationships with competitors? A. I gave him instructions that we would work together, he and Lingemann and myself on the thing, and naturally he would follow the market price. I did not want to have him go out and cut prices, because we were losing money.

Q. And he failed to carry out the instructions as to his relationships with competitors? A. He failed to carry out my instructions, sir. I am leaving out the question of competitors.

Q. I am not. I am directing your attention to it. A. All right, sir, but I am just telling you——

* * *

The Witness: I would like to make this statement, Mr. Wooden, that at no time and no place and nowhere have I given instructions to the Aetna Company to go to work and talk to competitors as to what they are going to do. At no time."[51]

Johnson, examined as to whether Calvin, who became Manager, had been suggested or recommended by competitors, testified:

"Q. When you first began to think of discharging Mr. Cree did you have his successor in mind or did you give consideration to who might be his successor? A. No, I did not.

Q. Was Mr. Calvin recommended by any of your competitors to be Mr. Cree's successor? A. No, sir.

Q. Did anyone recommend him? A. Not that I know of.

Q. Who selected him? A. I did.

Q. On what basis? A. On the basis of what I had known of the gentleman, of his record as I had followed it. I had met him two or three times at various meetings of the Cement Association.

Q. Who introduced him? A. I do not know.

Q. Was he introduced by some competitor? A. I do not think so. I think I just went up and said, 'Is this Calvin of Consolidated,' or whatever his

[51] (C) Tr. 1092-94.

concern was. I do not think anyone introduced him. No one introduced him to me as a proper timbre as a general manager.

Q. Do you mean to say while you did not know enough about the details of the business to know the customs and practices of the industry that you had been following Mr. Calvin's record before you selected him, and you knew what his record was? A. I was impressed with the way Calvin talked, and the way he looked, and I inquired about him, I asked some questions as to his standing and that was told to me, that he was a good, clean, straight-shooter. He was admired by his competitors for being honest and straight-forward.

Q. Where did you get that information? A. Oh, I do not know. I picked it up from two or three different people. I can not tell you now who they are.

Q. Some of the concerns in the cement business? A. I suspect some of them were in the cement business. Naturally they would be.

Q. Did Mr. Hogan every say a good word to you in behalf of Mr. Calvin? A. No, sir. On that point, in fact, when Mr. Calvin was appointed Mr. Hogan said, 'Have you got a good man there?' I said, 'I think so.' He said, 'I don't remember him. I would like to meet him sometime.'

Q. In other words, Mr. Hogan did not know Mr. Calvin although Mr. Hogan is intimately acquainted with the cement business and you knew Mr. Calvin although you knew little about the cement business? A. That is very true. One man can not know everybody.''[52]

Johnson testified that at the time he changed the management of the company, it had a bank balance of only $3,000; that about that time he had had to borrow $100,000 in Detroit to pay up a lot of back bills; and that after this had been done, he still found $70,000 or $80,000 owed by the company.[53]

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[52] (C) Tr. 1054-56.

[53] (C) Tr. 1076.

Crapo, Vice President of Huron, was examined as to his conversations with Johnson in regard to Aetna's conduct of its affairs, especially at about the time that Cree was dismissed, and Crapo testified:

"Q. You remember Mr. Johnson coming out there about July, 1936, to Detroit? A. Johnson came out to Detroit a number of times and never called on me. Now, just which one——

Q. Did you see him in July, 1936, when he came out? A. Can you connect that up with what incident was going on? I didn't see him at all in quieting of this Bay City, the original Bay City, or that trouble with Wabash at all.

Q. Did you see him in any connection or talk to him about any matters in July, 1936? A. I don't—let's see. This was recently, wasn't it? '36? When did he let Cree go?

Q. In that same month. A. Oh, I didn't see him at that time at all. That was his business.

Q. Did you talk with Mr. Johnson at any time about the failure of his management, Mr. Lingemann or Mr. Cree to carry out the instructions or the assurances that Mr. Johnson had made? A. Many times.

Q. And had you talked with Mr. Johnson about such matters during the several months preceding July, 1936? A. Well, I would have—I would have seen him in Boston, but if I was down—I would have talked with him every time I saw him about——

Q. I am not asking what you would have done but what you did do. A. I can't say whether I saw him in 1936 or not.

• • •

Q. I am asking you if you discussed with Mr. Johnson at any time the failure of Mr. Lingemann or Mr. Cree to carry out the cooperative attitude which Mr. Johnson assured you would be followed. A. Every time I met with Johnson I discussed that question with him.

Q. Did you have any occasion to discuss similar matters with him after Mr. Lingemann and Mr. Cree

left the service of the Aetna Company? A. I haven't happened to see Mr. Johnson."[54]

Calvin left a job at Consolidated to take the position as General Manager of Aetna. Examined as to his reason for doing so, he testified:

"A. Well, it was a better job in many respects. It paid a much better salary. I guess something more than twice what I was getting.

Q. Were there any considerations besides salary? A. Well, naturally, it was a position as general manager and vice-president, which was a good deal more responsibility, and it looked to me as if it presented a good deal better future and opportunity than the job I had.

Q. Did you accept the job with the Aetna Company because of any agreement among the cement companies in Michigan? A. No.

Q. Did you consult officials of any cement company before taking the position? A. I did not."[55]

Calvin was examined as to a conversation with Johnson and Mr. Bolster, a director in Boston, at which meeting he was offered the employment. Calvin testified:

"A. Well, during that conversation I asked Mr. Johnson and Mr. Bolster what their idea was about Cree. They had talked to me about taking Lingeman's job and said Lingeman was going to retire. They did not tell me at first what their idea was, rather sounding me out on what I had in mind, and I told them that I did not want Cree to ren ain in the organization if I took the job as general manager.

Q. Was this request of yours to get rid of Cree made pursuant to any agreement with any of your competitors? A. No.

Q. Was it made as the result of any pressure exerted on you by any of your competitors? A. No.

Q. Did you ever discuss this matter of discharg-

[54] (C) Tr. 11193-94.

[55] (R) Tr. 29901.

ing Cree with your competitors before Cree was discharged? A. No."[56]

After Johnson had come to Detroit in July 1936 and had asked Calvin to meet him there, Calvin testified:

> "A. Well, Mr. Johnson questioned me as to whether I was sure that we could not use Harold Cree, and I told him we could not. I did not want him there, that I thought it would be better for him to let him go than it would be for me, so he said all right, he would take care of it, and I think it was the next morning that he did it.
>
> Q. Were you a party to any agreement with any cement manufacturer or manufacturers to compel the resignation or discharge of Harold Cree? A. I was not.
>
> Q. Now, will you tell the Examiner why you wanted Cree to be discharged? A. Well, in the first place, I have a very poor opinion of Mr. Cree's ability as a good cement merchandiser. I knew his general ideas of selling cement were not in accord with mine. I did not think I could change his habits. I did not think he would be willing to change for me, and I did not see how we could get along. In addition to that, Mr. Cree did not have a good reputation in Michigan, which is our principal market, with the buyers of cement; that is, the contractors, the dealers, the highway departments, the county purchasing agents, and those people; I did not like his reputation. I did not want him with the company. I thought he would be a liability to me."[57]

As to the condition of Aetna, the state of its records and its affairs which Calvin found when he took over the management, he testified:

> "Q. Now, when you came with the Aetna Company in August, 1936, did you find as complete records for the company? A. Well, the records were

[56] (R) Tr. 29920.

[57] (R) Tr. 29926.

very meager. They had a set of books in there, and that is about all.

Q. Would you tell us whether or not you had copies of back invoices on shipments of cement? A. Oh, as far as that kind of records went, they did not even keep a copy of an invoice that they sent to a customer, and they had no general sales statistics that we usually have in the cement industry, or records of shipments. They had no records of contracts or obligations. The salesmen did not even make reports.

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Trial Examiner Norwood: Well, do you know whether or not they had been making them by telephone?

The Witness: They would call up once in a while by telephone.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Would you tell us whether or not you found any copies of sales instructions? A. No; none of any kind.

• • •

Q. Will you tell us whether or not you found the records of any of the current contracts of the Aetna Company when you came there? A. Practically none were there.

Q. Was there any way in which you could find out what the commitments of the Aetna Company were as of August 1, 1936? A. Not exactly. All you could find out was what you could get from different members of the company—talk to a salesman and ask him about his territory."[88]

And further:

"A. Well, I would just say they were wandering about. They did not know what to do next, or what they were supposed to do. They seemed to lack direction altogether, and they were in a state of low

[88] (R) Tr. 29932-33, 29935.

morale generally; dissatisfied; did not know what was going to happen to the company next; worried about their own future.

By Mr. Withrow:

Q. You said there were three salesmen. You kept those three salesmen on, Mr. Calvin? A. Yes, they are still with us."[59]

This state of low morale ran throughout the plant. Calvin testified:

"A. The morale of the men at that plant in the manufacturing site of the company was in as low a state as the sales, probably lower. I found out afterwards that two or three of the key men were looking around to see if they could find another job, because they were afraid the company was going broke and they would be out of employment."[60]

As to Calvin's attitude toward Cree after Cree's dismissal and his effort to help Cree find employment, Calvin testified:

"Q. Did you take any steps whatsoever to prevent Cree from getting any job in the cement business? A. I did not.

Q. Did you make any effort to help Cree to find a new position? A. I made several efforts. Several people talked to me about this, asked about him, wrote me letters. I answered the letters the best I could. In some instances where the letters came from someone I knew, I called them on the phone and talked to them about Harold. He tried to get some jobs being a jobber for tile and lime and sewer pipe and fabric, and all those things. I knew a number of those manufacturers, and they called me up.

Q. Did Mr. Cree know of your efforts on his behalf? A. He knew of some of them.

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[59] (R) Tr. 29936.

[60] (R) Tr. 29940.

Q. How do you know? A. Because he called me up at home once or twice and thanked me for putting in a boost for him.'"[61]

The witness Fowley, called by the Commission, testified that she was employed by Aetna from June, 1930 to September 1, 1937 as Secretary to Lingemann, the General Manager, and that in her general office duties she took dictation from Lingemann, Cree, Johnson and others.[62] She testified that after Calvin took charge, he consulted his competitors by telephone as to prices to be quoted.[63]

Examined as to this testimony by Fowley, Calvin testified:

"Q. Now, on record page 843 Miss Fowley testified that you consulted other companies on prices to be quoted on jobs. Did you ever consult a competitor on a price to be quoted on a job? A. Not on prices.

Q. Did you ever call a competitor concerning a job? A. Yes, I have talked to competitors about jobs.

Q. Now, would you tell us when and where and what the conversation was? A. I couldn't tell you exactly when or where, but roughly, when I first got with the company they did not have a freight rate department; they had no tariff; they had no traffic department. They had nothing.

Trial Examiner Norwood: Did you ever ask any competitor for any freight information?

The Witness: Yes; certainly.

Trial Examiner Norwood: You have done that?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Well, why did you ask a competitor about the freight rates? A. I had nobody in our company that

[61] (R) Tr. 29941-42.

[62] (C) Tr. 835-38.

[63] (C) Tr. 843-45.

handled that, no freight rate department. It was the quickest and easiest way to get it, and I had a great deal to do, so that is the way I got it.

Q. Now, do you have occasion, or have you had occasion to call competitors now to ask them about freight rates? A. No. We have a traffic department, so we have no trouble with it at all.

Q. Would you tell us whether or not you could obtain this same freight rate information from the railroads? A. I doubtless could have.

* * *

Q. Why didn't you ask the railroads for this freight information? A. There was a simpler way to get it. There were only a few instances.

Q. Now, on record page 847 Miss Fowley testified that you constantly telephoned Universal about the prices on specific jobs. Would you tell us whether or not that is correct? A. That is not a correct statement.

Q. Did you ever telephone them about the prices on any specific job? A. Nothing about the prices.

Q. And in these instances where you say you telephoned and asked for freight rate information, would you tell us whether or not you were free to quote any price that you wanted to quote after such a conversation? A. Certainly I was free."[44]

On May 7, 1937 Calvin wrote to Johnson concerning the selling expense per barrel and the general administrative expense per barrel and urged Johnson to seek advice from Hogan as to what such expenses reasonably should be. In that connection he said:

[Italicized part quoted in Fdgs. Par. Ten (i)]

"In order for him (Hogan) to get a fair idea of our problem it should be further explained that our merchandising has been rather chaotic—that we only had three salesmen and that *we are now merchandising our cement according to the ethics of the industry* and that I have seen fit to put on many new salesmen which are green and that we are in the

[44] (R) Tr. 30112-15.

process of developing a sales organization and *in the process of getting business on a new basis.* These conditions all cost money. I would like to get an expression from him as to what he thinks a fair cost per barrel under our condition would be."[65]

Asked to explain what he meant by the phrase "ethics of the industry" Calvin testified:

"A. Well, as far as I am concerned, what I meant by 'ethics' was selling the cement on what I thought was a sound policy, and my general announced policy through my salesmen to the trade. It is in contrast to going out and chiseling all the time, double-crossing your dealers, like they had been doing before up there. It was more in conformity with what I thought was a square deal to the customers."[66]

Following Calvin's assumption of the management of Aetna, prices did not rise in Michigan and Calvin's effort to affect a rise in December 1936 failed.[67] Prices in the Detroit area per barrel in cloth fell in January, June and August, 1937.[68] Aetna allowed dealers to truck from its mill, and trucked itself all over Michigan.[69] It made special prices below current openly quoted market prices,[70] and bid on the so-called Good Friday invitation quoting an f.o.b. mill price,[71] and it sold the Indiana Farm Bureau at more points than Cree had sold it.[72] It also substantially increased the number of its dealer accounts and its volume of business.[73]

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[65] Com. Ex. 97.

[66] (R) Tr. 30183.

[67] Calvin, President, Aetna (R) Tr. 30061-62, 30068-69.

[68] Resp. Ex. 3561.

[69] Calvin, *supra*, Tr. 30128.

[70] Id., Tr. 30173.

[71] Resp. Exs. 2023, 2024.

[72] Calvin, *supra*, Tr. 30156.

[73] Id., Tr. 30012-13.